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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 149.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, AND CHARLES D. BARRY, TRADING AS COPARTNERS UNDER THE FIRM NAME AND STYLE OF HENRY W. PEABODY & CO., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 23, 1903.

(19142.)

(19142.)

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1 United States District Court, Southern District of New York.

FREDERICK W. LINCOLN ET AL., Trading as Henry W. Peabody & Co., Plaintiff- in Error,
against
THE UNITED STATES, Defendant in Error.

Statement.

1902.
Mc'h 19. Petition filed
May 16. Answer filed
Sep. 16. Demurrer to answer filed
1903.
Nov. 17. Demurrer overruled
" 18. Opinion, Adams, J., overruling demurrer.
" 18. Order for judgment filed
" 18. Judgment entered
" 19. Petition for writ of error filed
" 19. Writ of error allowed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you between Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, and the United States, a manifest error hath happened, to the great damage of the said Henry W. Peabody and Company, petitioners, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid, on or before the 30th day of November, 1903, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 19th day of November,
3 in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

{ Seal District Court of the United States, Southern District New York. }

THOS. ALEXANDER,
Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

GEO. B. ADAMS,
United States District Judge.

4 [Endorsed:] United States Supreme Court, October term, 1903. Frederic W. Lincoln, and others, trading as copartners under the firm name and style of Henry W. Peabody and Company, plaintiffs in error, against The United States, defendant in error. Writ of error. Henry M. Ward attorney for plaintiffs in error, office and post office address No. 32 Nassau street borough of Manhattan city of New York Copy of the within paper has been this day received at this office Nov. 19 1903 Henry L. Burnett, U. S. attorney. S. Filed Nov'r 19 1903.

5 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Thomas Alexander, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 21st day of November in the year of our Lord one thousand nine hundred and three, and of the Independence of the said United States the one hundred and twenty-eighth.

[Seal District Court of the United States, Southern District of N. Y.]

THOS. ALEXANDER, *Clerk.*

6 In the District Court of the United States for the Southern District of New York.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. Bradlee, Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody & Company, Petitioners,

against

THE UNITED STATES, Defendant.

No. —.

Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody & Company, the petitioners above named, by Henry M. Ward, their attorney, for their petition against The United States, the defendant above named, respectfully show to the court and allege as follows:

First. That at all the times hereinafter mentioned your petitioners were and they now are trading and doing business in the city of New York, State of New York, and the city of Boston, State of Massachusetts, as copartners under the firm name and style of Henry W. Peabody & Company. That your petitioner Frederic W. Lincoln is a citizen of the State of New York, a resident of the city of New York, and an inhabitant of the southern district of New York. That your petitioner Henry W. Peabody is a citizen of the State and inhabitant of the district of Massachusetts. That your petitioner John R. Bradlee and Charles D. Barry are citizens of the State and inhabitants of the district of New Jersey.

Second. That on the 10th day of December, 1898, a treaty of peace between the United States of America and the Kingdom of
7 Spain was concluded and signed by their respective plenipotentiaries at Paris, in the French Republic. Said treaty was ratified by the Senate and by the President of the United States on the 6th day of February, 1899, and by Her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the city of Washington, in the District of Columbia, on the 11th day of April, 1899, and on the same day the said treaty was proclaimed by the President of the United States.

Third. That at the date of the ratification of the said treaty, the military and naval forces of the United States had seized, occupied and were in possession of the town and port of Manila, in the island of Luzon. That under and pursuant to the terms of said treaty, the said island of Luzon, being a part of the archipelago known as the Philippine islands, was ceded by Spain to the United States and the rightful possession thereof recognized, and such cession was accepted by the United States. That by said treaty Spain promised and agreed that it would evacuate the territory so ceded by it, which it thereupon proceeded to do. That at all times thereafter said island of Luzon, and particularly the said town and port of Manila

in said island, have remained in the complete possession of the United States without interference by Spain or by any other power, and the United States has, since the date of the ratification of said treaty, exercised full administrative and legislative authority over said town and port of Manila.

Fourth. That prior to the date of the signing of the said treaty of peace, the President of the United States made and issued a certain executive order, dated at the executive mansion in the city of Washington, July 12th, 1898, and published by the Secretary of War by order of the President, on the 13th day of July, 1898. The
8 said order provided in substance that upon the occupation and possession of any ports and places in the Philippine islands by the forces of the United States, duties and taxes should be levied and collected upon articles imported into the Philippine islands from other countries, and upon articles exported from the Philippine islands to other countries at the rates and in the manner and subject to the regulations set forth and established by the customs tariff and regulations for the Philippine islands thereunto annexed.

Thereafter, by order of the Secretary of War, dated at the War Department, Washington, October 13th, 1898, and known as "Tariff Circular No. 18," it was ordered that the operation of said order of the President of July 12, 1898, establishing a customs tariff and regulations for ports in the Philippine islands should be suspended until the 10th day of November, 1898, when the same should take effect and be in force, and that until that time the Spanish tariff as theretofore in force should be in force and duties collected thereunder. That in accordance with the last-named order on and after November 10th, 1898, the said tariff and regulations were put in force at the various ports of entry in the Philippine islands, and more particularly at the said port of Manila, in the island of Luzon. That the said customs tariff and regulations so established by the said order of the President, of July 12th, 1898, as modified by certain amendments thereof made by order of the President from time to time, remained in force at all the ports of entry in the Philippine islands, and more particularly at the said port of Manila from on or about the 15th day of November, 1898, until on or about the 15th day of November, 1901. That during all of that period import duties were collected under the alleged authority of said orders and of said tariff by the military authorities of the United States upon articles imported and brought into the several
9 ports of entry in the Philippine islands from the ports in the several States and Territories of the United States, as well as from ports in foreign countries.

Fifth. That said customs tariff and regulations for the Philippine islands provided, among other things, that every vessel on its arrival should be placed under military guard until duly discharged, and that no merchandise should be delivered until after the payment of the proper duties and charges thereon, when an order for the delivery of the merchandise should be issued by the

proper military officer, and that any objection to the assessment of the duties must be filed by the importer before payment by him of the same, and that no refund of duties would be made thereafter, and that no delivery of imported merchandise should be made to the importer unless he had duly paid in cash the duties assessed thereon, and that any goods, wares or merchandise, not duly entered for payment of duty within ninety days after importation should be sold at auction by order of the commanding officer, and that the proceeds of such sale should be retained for ten days subject to the demand of the importer, after deduction of the proper duties on the goods and all expense of storage and sale; and that all seized and confiscated goods should be sold in like manner.

The said tariff set forth the rates of duties on imports in certain schedules annexed thereto, and these petitioners beg leave to refer to the said customs tariff and regulations as established by the said orders of the President and to the amendments thereof, and to make the same a part of this petition as fully to all intents and purposes as if herein set forth at large.

10 *Sixth.* That during the said period from November 10th, 1898, until November 15th, 1901, certain officers of the United States Army were designated under orders of the President to act, and did act as collectors of customs at the several ports in the Philippine islands, and particularly at the said port of Manila, and enforced the said tariff and regulations and collected duties thereunder at the rates thereby provided upon articles imported and brought into the ports in the Philippine islands, and more particularly the port of Manila from ports in the several States of the United States, at the same rates and in the same manner as upon articles imported from ports in foreign countries.

Seventh. That at all the times herein referred to your petitioners were and they now are engaged in a general commission and mercantile business between the ports of New York in the State of New York, and the said port of Manila, in the island of Luzon, having agents and correspondents in the said port of Manila, and in other ports in other countries and having offices for the transaction of their business in the city of New York, in the State of New York, and in the city of Boston, in the State of Massachusetts, and in the course of such business your petitioners have shipped certain articles, the growth, produce or manufacture of certain of the States of the United States, to their agents and correspondents in the said port of Manila, and during the same period your petitioners have also imported large quantities of articles, the growth or produce of the Philippine islands, into the said port of New York.

Eighth. That in the course of their business as aforesaid, your petitioners, in or about the month of October, 1900, shipped from the said port of New York, in the State of New York, certain articles the manufacture of certain of the States, to-wit certain iron ware and samples by the vessel "Polarstjernen," consigned to your

11 petitioners' agents at the port of Manila. That said vessel made a continuous voyage from the port of New York to the port of

Manila, and arrived at the latter port on or about the 22nd day of November, 1900. That upon the arrival of said vessel at said port of Manila, the military officer of the United States then acting as collector of customs for the port of Manila took the aforesaid merchandise into his custody and placed the same under military guard in the manner established by the said customs regulations, and proceeded to assess and levy duties thereon at the rates set forth in said customs tariff, amounting to two hundred and fifty-three dollars and twelve cents ($253.12), Mexican silver, and thereupon demanded payment of the amount of said duties from your petitioners' agents, and threatened in the event of default in the payment thereof to seize said merchandise with the military forces at his command and to sell the same for the payment of such duties, as provided in said customs regulations. That thereupon your petitioners' agents, in order to obtain possession of the said articles so consigned to them by your petitioners, and in order to be able to carry on your petitioners' business as aforesaid, were obliged to pay and did pay to said military officer acting as such collector, but under duress and by compulsion of such threat, the amount of duties so assessed by him, and upon such payment said articles were by the said collector released and delivered to your petitioners' agents.

Ninth. That on various other occasions between October, 1900, and January, 1901, your petitioners have in like manner shipped and consigned other articles of merchandise, the growth, produce and manufacture of certain of the States of the United States, from said port of New York to their agents in the said port of Manila, upon vessels
12 making continuous voyages from said port of New York to the said port of Manila, and upon the arrival of such vessels at the latter port the said articles of merchandise have been taken into the custody of the military officer acting as collector of customs, and duties have been in like manner assessed thereon and paid by your petitioners' agents, but under duress and by compulsion, in order to enable your petitioners' business to be carried on, as set forth in the preceding paragraph.

And your petitioners file herewith and marked "Exhibit A," a schedule showing such payments of duties exacted from your petitioners as aforesaid at the port of Manila, with the names of the vessels bearing said merchandise, the date of arrival thereof at the port of Manila, the port of shipment, the nature of the articles, the dates of payment, the amount of duties so paid, with the items of duties so paid, amounting to one thousand four hundred and twenty-six dollars and ninety-seven cents ($1,426.97), Mexican silver, equalling seven hundred and thirteen dollars and forty-eight cents ($713.48) in gold coin of the United States.

Tenth. That after collecting the amounts of duties so assessed and levied upon the articles so shipped by your petitioners to Manila as aforesaid, the said military officer acting as collector of customs paid the same over to the United States, and said amounts of money are now in the possession of the United States.

Eleventh. That as your petitioners are advised by counsel, the proper construction of the said order of the President of July 12th, 1898, and of the customs tariff and regulations thereby established, as amended from time to time, is that they ceased to apply to all articles imported and brought into the several ports of the Philippine islands, and more particularly the said port of Manila from ports in the several States
13 of the United States, at the moment the United States ceased to be a foreign country with respect to the Philippine islands: that is to say, on or prior to the 11th day of April, 1899, and that all articles so shipped by your petitioners to their agents at the port of Manila, as specified in the annexed schedule, were not subject to any import duties, and were entitled to free entry into the said port of Manila.

Twelfth. That as your petitioners are advised by counsel, the imposition and collection of said duties upon the articles aforesaid, in the manner aforesaid, and in the amounts set forth in the annexed schedule, or in any amount, were in violation of the rights and privileges secured to your petitioners under and by virtue of the provisions of the Constitution and laws of the United States and the said treaty of peace between the United States and Spain. And your petitioners claim that they are entitled to recover said moneys from the United States, and base their claim thereto upon the United States Constitution, the laws of the United States and said treaty with Spain.

Thirteenth. That no part of the moneys so exacted from your petitioners as aforesaid has ever been paid to them, or any of them, by the United States, although payment thereof has been demanded. And by reason *the* the facts aforesaid, the sum of seven hundred and thirteen dollars and forty-eight cents ($713.48) in gold coin of the United States, the equivalent of the amount so exacted from your petitioners and paid to the military officer acting as collector of customs at Manila as aforesaid, is now due to and owing your petitioners from the United States.
14 Wherefore, your petitioners demand judgment against the United States for the sum of seven hundred and thirteen dollars and forty-eight cents ($713.48), gold coin of the United States, with interest thereon from the 22nd day of November, 1900, and the costs of this action.

March 27th, 1902.

HENY M. WARD,
Attorney for Petitioners, # 30 *Broad Street,*
New York City.

15 SOUTHERN DISTRICT OF NEW YORK, } ss:
State of New York, County of New York, }

Charles D. Barry, being duly sworn, deposes and says that he is one of the petitioners herein. That he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief. The sources of information and grounds of

his belief are an examination of the records in the petitioners' New York office and certified statements furnished to him by the petitioners' agents and correspondents in the port of Manila. No assignment or transfer of said claim, or any part thereof, has been made, and deponent believes that the petitioners are rightfully and justly entitled to the full amount named and stated in the said petition, after allowing all just credits and set-offs, if any.

CHAS. D. BARRY.

Subscribed and sworn to before me this 27th day of March, 1902.

CHAS. A. CONLON,

[NOTARIAL SEAL] *Notary Public, New York County.*

15½ [Endorsed:] U. S. district court, southern district of New York. Frederic W. Lincoln and others, trading as co-partners under the firm name and style of Henry W. Peabody & Company, petitioners, *vs.* The United States. (Copy.) Petition. Henry M. Ward attorney for petitioners, # 30 Broad street, New York city. U. S. district court, S. D. of N. Y. Filed Mar. 29, 1902.

16 United States District Court, Southern District of New York.

FREDERICK W. LINCOLN and Others, Trading as Co-partners under the Firm Name and Style of H. W. Peabody & Company, Petitioners,

vs.

THE UNITED STATES.

Answer to Petiton.

The United States of America, the defendant above named, by Henry L. Burnett, its attorney for the southern district of New York, in answer to the petition herein, respectfully shows to the court:

First. That at the times and dates of the importations of merchandise by the petitioners from the United States into the Philippine islands, mentioned and set forth in the eighth and ninth allegations of said petition respectively, to wit, between October, 1890, and January, 1901, there existed an armed insurrection in said Philippine islands of such magnitude and extent as to require military operations and control by the military forces of the United States for its suppression and having for its object the expulsion of the sovereignty of the United States from said islands, whereby the territory of said islands was rendered hostile, and trade with said hostile territory was unlawful except by the permission of the commander of the belligerent force then conducting military operations in said hostile territory, and under such regulations and conditions as were then imposed and in force by the military authorities of the United States.

Second. And defendant, referring to the third allegation of
17 said petition, avers that while it is true that the town and port of Manila in said islands was in the actual, possession of the United States, at the times therein mentioned, yet said possession was challenged and interfered with by hostile insurrectionary military forces, and was held by the United States only by force of arms and military occupation and government, as a part of a hostile territory, and defendant therefore denies that the same was in the peaceable possession of the United States, at the times mentioned in said petition.

Third. That after February 4, 1898, when said hostilities against the United States in said islands were inaugurated, all articles of merchandise, including those of the petitioners, shipped to and entered in any port in the said islands, including Manila, then territory hostile to the United States, were under the laws and usages of war, and the Constitution and laws of the United States and under the orders and regulations of the military commander of the forces of the United States set forth in the fourth allegation of said petition liable to the payment of the several sums of money mentioned and set forth in said petition, as duties, and payable to the military officer of the United States, then acting as collector of customs for the port of Manila, not only under said laws, usages, orders and regulations, but also as a condition imposed upon the privilege of trading with hostile territory.

Fourth. That the customs duties exacted by the military government of the Philippines, at said times mentioned in said petition, were properly enforced by an exercise of the belligerent rights of the United States, arising from the conditions then existing in said islands, then a hostile territory.

18 Fifth. That the right of the President of the United States, through his officers and agents to exact duties upon merchandise imported into the Philippine islands, at the times mentioned in said petition, and to regulate commercial intercourse with said islands, was lawful and justifiable as an exercise of the war powers of the United States in territory affected by an armed insurrection, and in a condition of violent and serious hostility against its sovereignty. That the right to exercise the war powers of the nation does not depend upon the question as to whether or not the territory is foreign, but whether or not the territory is hostile. That the President of the United States was authorized to determine the question as to whether or not the conditions existing at the times of petitioner's importations in the Philippine islands rendered that territory hostile, and his determination thereof was and is binding upon the courts.

Sixth. And the defendant further answering avers that this court has no jurisdiction of the subject matter of this action.

Seventh. And further answering, the defendant avers, that the petition herein does not state facts, sufficient to constitute a cause of action against the United States.

Wherefore this defendant prays judgment that the petition of the petitioner herein be dismissed with costs.

Dated May 26, 1902.

HENRY L. BURNETT,
United States Attorney for the Southern District of New York.

Room 50, P. O. building, New York city.

18½ [Endorsed:] United States district court, southern district of New York. Frederick W. Lincoln *et al. vs.* The United States. Answer to petition. Henry L. Burnett, United States attorney, attorney for defendant. U. S. district court, S. D. of N. Y. Filed May 26, 1902. Henry M. Ward, counsel, 32 Nassau street, New York.

19 United States District Court, Southern District of New York.

FREDERICK W. LINCOLN and Others, Trading as Copartners under the Firm Name and Style of H. W. Peabody & Company, Petitioners,

against

THE UNITED STATES.

The petitioners above named by Henry M. Ward, their attorney, demur to the answer of The United States, the defendant herein:

First. Upon the ground that it is insufficient in law upon the face thereof.

HENRY M. WARD,
Attorney for Petitioners, 32 Nassau Street, Borough of Manhattan, City of New York.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

New York, September 25, 1902.

FREDERICK R. COUDERT, JR.,
Of Counsel for Petitioners.

STATE OF NEW YORK, }
County of New York, Southern District of New York, } *ss.*

Charles D. Barry, being duly sworn deposes and says I am one of the herein named plaintiffs. The foregoing demurrer is not interposed for delay.

CHAS. D. BARRY.

Sworn to before me this 25th day of September, 1902.

[NOTARIAL SEAL.]

CHAS. A. CONLON,
Notary Public, New York Co.

19½ [Endorsed:] United States district court, southern district of New York. Frederick W. Lincoln, and others, trading as copartners under the firm name and style of H. W. Peabody & Company, petitioners, *vs.* The United States. Petitioners' demurrer to answer. Henry M. Ward attorney for petitioners. Office and post office address No. 32 Nassau street borough of Manhattan city of New York U. S. district court S. D. of N. Y. Filed Sept. 6, 1902 11 17 1903 Demurrer overuled G. B. A.

20 In the District Court of the United States for the Southern District of New York.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody and Company, Petitioners,
against
THE UNITED STATES.

Opinion of the Court.

This cause coming on to be heard upon the petitioners' demurrer to the answer interposed in behalf of the United States, and due deliberation having been had thereon, the court now finds and concludes that this court has jurisdiction of the subject matter of the claim set forth in the petition and that the petition sets forth facts sufficient to constitute a cause of action against the United States, under the authority of *Dooley v. United States*, 182 U. S. 222, and the court further finds and concludes that the facts set forth in the answer are sufficient in law as a defense to the petitioners' cause of action. The petitioners' demurrer to the answer should therefore be overruled with costs and the petitioners' counsel having stated in open court that they did not dispute the facts pleaded in the answer and elected to stand on their demurrer, the court further concludes that the petition should be dismissed on the merits, with costs, and that the United States should have judgment accordingly.

Dated, November 18, 1903.

GEO. B. ADAMS,
United States District Judge.

20½ [Endorsed:] United States district court, southern district of New York. Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners, against The United States. Opinion of the court. Henry L. Burnett, United States attorney, attorney for defendant.

21 In the District Court of the United States for the Southern District of New York.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody and Company, Petitioners,
against
THE UNITED STATES.

Order for Judgment.

This cause coming on for a hearing upon the petition filed herein on the 29th day of March, 1902, and the answer of the United States filed herein on the 26th day of May, 1902, and the petitioners' demurrer to the sufficiency of the answer, filed herein on the 25th day of September, 1902, and the court having filed its opinion this day, now, after hearing Henry C. Platt, Esq., of counsel for the United States, in support of the answer, and Paul Fuller, Esq., and Frederic R. Coudert, Jr., Esq., of counsel for the petitioners, in support of the demurrer, it is now, on motion of Henry L. Burnett, Esq., United States attorney,

Ordered, that said demurrer be and it is hereby overruled, with costs, and the petitioners having elected to stand on the demurrer, it is further

Ordered, that the United States have judgment against the petitioners, dismissing the petition on the merits, with costs to be taxed by the clerk.

Dated, November 18, 1903.

(S'd) GEO. B. ADAMS,
United States District Judge.

21½ [Endorsed:] United States district court, southern district of New York. Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners, against The United States. Order for judgment. Henry L. Burnett, United States attorney, attorney for defendant. Filed Nov'r 18, 1903

22 United States District Court, Southern District of New York.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, Trading as Copartners under the Firm Name and Style of Henry W. Peabody and Company, Petitioners,
against
THE UNITED STATES.

Judgment.

This cause having been brought on for argument before the Honorable George B. Adams, district judge, at a stated term of this court, and the petitioners having appeared by Henry M. Ward, Esq., their attorney, and the United States by Henry L. Burnett, Esq., United States attorney, and argument having been had upon petitioners' demurrer to the answer, and the court having made and filed its opinion thereon and therewith its order dated November 18, 1903, overruling said demurrer and dismissing the petition on the merits, and the costs of the United States having been adjusted at the sum of fifteen and 90/100 dollars,

Now, on motion of Henry L. Burnett, Esq., United States attorney, it is

Ordered, adjudged and decreed that the petition be and it is hereby dismissed upon the merits, and that the United States recover of the petitioners the said sum of fifteen and 90/100 dollars costs, and have execution therefor.

Dated, November 18th 1903.

THOS. ALEXANDER,
Clerk of the United States District Court for the Southern District of New York.

22½ [Endorsed:] United States district court, southern district of New York. Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee, and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners, against The United States. Judgment. Henry L. Burnett, United States attorney, attorney for defendant. Filed Nov'r 18, 1903 at 2 p. m. & docketed judgment.

23 In the District Court of the United States for the Southern District of New York.

FREDERIC W. LINCOLN, HENRY W. PEABODY, John R. Bradlee, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody and Company, Petitioners,
against
THE UNITED STATES.
} Petition for Writ of Error.

Now come Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners herein, and conceiving themselves aggrieved by the judgment entered herein on the 18th day of November, 1903, do hereby pray that a writ of error be allowed from the said judgment, returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and they present herewith their assignment of errors.

November 19th, 1903.

HENRY M. WARD,
Attorney for Petitioners, 32 Nassau Street, Borough of Manhattan, New York City, New York.

PAUL FULLER, JR.,
F. R. COUDERT,
Counsel.

And now, to wit, on this 19th day of November, 1903, it is ordered that the writ of error be allowed as prayed for.

GEO. B. ADAMS,
United States District Judge.

23½ [Endorsed:] United States district court, southern district of New York. Frederic W. Lincoln, and others, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners, against The United States. Petition for writ of error. Henry M. Ward attorney for petitioners, office and post office address No. 32 Nassau street borough of Manhattan city of New York. A copy of the within paper this day received at this office Nov'r 19, 1903. Filed Nov'r 19, 1903.

24 By the Honorable George B. Adams, one of the judges of the district court of the United States for the southern district of New York, in the second circuit, to Henry L. Burnett, Esq., United States attorney for the southern district of New York, attorney for the United States herein, and to the United States, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, on the 30th day of November, 1903, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of New York, wherein Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody & Company, are plaintiffs in error, and The United States is defendant in error, to show cause, if any there by, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 19th day of November in the year of our Lord one thousand nine hundred and three and of the Independence of the United States the one hundred and twenty-eighth.

GEO. B. ADAMS,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

24½ [Endorsed:] United States Supreme Court, October term—1903, Frederic W. Lincoln, and others, trading as copartners under the firm name and style of Henry W. Peabody and Company, plaintiffs in error, against The United States, defendant in error. Citation. Henry M. Ward, attorney for plaintiffs in error, office and post office address No. 35 Nassau street borough of Manhattan city of New York A copy of the within paper this day received at this office Nov'r 19, 1903 Henry L. Burnett U. S. attorney Filed Nov'r 19, 1903

25 In the District Court of the United States for the Southern District of New York.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody and Company, Petitioners,
against
THE UNITED STATES.

Bond for Damages and Costs.

Know all men by these presents, that we, Lorenzo Semple and F. R. Coudert, Jr., are held and firmly bound unto the above named The United States, in the sum of two hundred and fifty dollars ($250.00), to be paid to the said The United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated the 19th day of November, in the year of our Lord one thousand nine hundred and three.

Whereas, the above named petitioners, Henry W. Peabody and Company, have sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the judge of the district court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such that if the above named Henry W. Peabody and Company shall prosecute their writ of error to effect, and answer all damages and costs if they
26 fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LORENZO SEMPLE. [L. S.]
FREDERIC R. COUDERT, JR. [L. S.]

Sealed and delivered and taken and acknowledged before me this 19th day of November, 1903.

[NOTARIAL SEAL.]

CHAS. A. CONLON,
Notary Public, New York Co.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Lorenzo Semple and F. R. Coudert, Jr., being duly and severally sworn, do depose and say each for himself that he is worth the sum of five hundred dollars ($500.) over and above all his just debts and liabilities.

LORENZO SEMPLE.
FREDERIC R. COUDERT, JR.

Sworn to before me this 19th day of November, 1903.

[NOTARIAL SEAL.] CHAS. A. CONLON,
Notary Public, New York Co.

The foregoing bond is hereby approved.

GEO. B. ADAMS,
U. S. District Judge.

Dated N. Y. Nov'r 19, 1903.

26½ [Endorsed:] United States district court, southern district of New York. Frederic W. Lincoln, and others, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners, against The United States. Bond for damages and costs on writ of error. Henry M. Ward attorney for petitioners, office and post office address No. 32 Nassau street borough of Manhattan city of New York Filed Nov'r 19, 1903.

27 Supreme Court of the United States, October Term, 1903.

FREDERIC W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, Trading as Copartners under the Firm Name and style of Henry W. Peabody and Company, Plaintiffs in Error,
against
THE UNITED STATES, Defendant in Error.
} Assignment of Errors.

Now come Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee, and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody & Company, by their counsel, and respectfully represent that they feel aggrieved by the proceedings and judgment of the district court of the United States for the southern district of New York in the second judicial circuit in the above entitled cause, and assign errors thereto as follows:

1st. The court erred in holding that the imposition and collection of duties in the port of Manila under the order of the President of the United States as set forth in the petition was not in violation of the first section of the first article of the Constitution of the United States which declares that

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

2nd. The court erred in holding that the imposition and collection of said duties was not in violation of that portion of the seventh section of the first article of the Constitution, which declares that

"All bills for raising revenue shall originate in the House of Representatives."

28 3rd. The court erred in holding that the imposition and collection of said duties was not in violation of that portion

of the eighth section of the first article of the Constitution which declares that

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

4th. The court erred in holding that the imposition and collection of said duties was not in violation of that portion of the eighth section of the first article of the Constitution which declares that Congress shall have power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

5th. The court erred in holding that the imposition and collection of said duties was not in violation of that portion of the ninth section of the first article of the Constitution which declares that

"No tax or duty shall be laid on articles exported from any State."

6th. The court erred in holding that the imposition and collection of said duties was not in violation of that portion of the third section of the fourth article of the Constitution which declares that

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

7th. The court erred in holding that the imposition and collection of said duties was not in violation of that portion of the fifth amendment of the Constitution which declares that

"No person * * * shall be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

29 8th. The court erred in holding that the imposition and collection of said duties was not in violation of the treaty of peace made between the United States and the Kingdom of Spain on the 10th day of December, 1898, known as "The treaty of Paris."

9th. The court erred in holding that at the time of the imposition and collection of the duties as stated in the petition the port of Manila was not a part of the United States.

10th. The court erred in holding that the President of the United States under the powers granted to him by the Constitution could lawfully impose and collect from the petitioners the amount of duties set forth in the petition.

11th. The court erred in not holding that the proper construction of the orders of the President under which the duties mentioned in the petition were collected is that they ceased to apply to goods imported from a port of a State into the port of Manila from and after the 11th day of April, 1899, and in not holding that upon the dates specified in the petition and schedule the petitioners' goods were entitled to free entry.

12th. The court erred in holding that the facts set forth in the

answer are sufficient in law as a defense to the petitioners' cause of action as set forth in the petition.

13th. The court erred in overruling petitioners' demurrer to the answer.

14th. The court erred in dismissing the petition.

15th. The court erred in not entering judgment for the petitioners for the amount claimed in the petition.

Wherefore, the said Frederic W. Lincoln, Henry W. Peabody,
30 John R. Bradlee and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, plaintiffs in error, pray this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the district court of the United States for the southern district of New York, in the above entitled cause.

HENRY M. WARD,
Attorney for Plaintiffs in Error, 32 Nassau Street, Borough of Manhattan, New York City, New York.

PAUL FULLER,
F. R. COUDERT, JR.,
Counsel.

31 [Endorsed:] United States Supreme Court, October term, 1903. Frederic W. Lincoln and others, trading as copartners under the firm name and style of Henry W. Peabody and Company, plaintiffs in error, against The United States, defendant in error. Assignment of errors. Henry M. Ward, attorney for plaintiffs in error, office and post office address No. 32 Nassau street, borough of Manhattan, city of New York. A copy of the within paper this day received at this o ce. Nov'r 19, 1903. Henry L. Burnett, U. S. attorney. Filed Nov'r 19, 1903.

32 [Endorsed:] 4–112. U. S. district court, southern district of New York. Frederic W. Lincoln, Henry Peabody, John R. Bradlee, and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody and Company, petitioners, against The United States. Return on writ of error.

Endorsed on cover: File No. 19,142. S. New York D. C. U. S. Term No. 491. Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee, and Charles D. Barry, trading as copartners under the firm name & style of Henry W. Peabody & Co., plaintiffs in error, vs. The United States. Filed November 23rd, 1903. File No. 19,142.

O

FILE COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 466.

WARNER, BARNES AND COMPANY, LIMITED, APPELLANT.

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 17, 1904.

(19566.)

(19566.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 466.

WARNER, BARNES AND COMPANY, LIMITED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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13376—05——1

1 I.—Petition. Filed January 18, 1902.

Import Duties. Philippine Claim No. 1.

In the United States Court of Claims, Term 1901–1902.

WARNER, BARNES & COMPANY, LIMITED, Claimant,
vs.
THE UNITED STATES.
No. 22757.

Warner, Barnes & Company, Limited, by Henry M. Ward, its attorney, for its petition against the United States respectfully shows to the court and alleges as follows:

1. That at all the times hereinafter mentioned from and after September 12th, 1899, the petitioner was and it now is a business corporation, organized and existing under the laws of the Kingdom of Great Britain, and a subject of the King of Great Britain, having an office for the general transaction of its business at No. 25 Broad street, in the borough of Manhattan, city of New York and State of New York, and having another office for the general transaction of its business at the port of Manila, Philippine islands.

2 2. That the name set forth above in the title of this action is the full and true name and style of the petitioner, and this petitioner is the successor in business of the firm of Warner, Barnes & Co. a copartnership organized in England and existing under the laws of the Kingdom of Great Britain, which said firm was, between the 10th day of December 1898 and the 12th day of September, 1899, composed of Edwin H. Warner, Charles I. Barnes, and William R. Anderson, all British subjects. That said firm was, during said period of time engaged in the same business as was this petitioner thereafter, as herein alleged, and on or about the 12th day of September 1899 said firm of Warner Barnes & Co. dissolved and ceased to do business as a partnership and reorganized pursuant to the laws of Great Britain as a corporation, the petitioner herein, under the corporate name of Warner Barnes & Co., Limited. That thereupon said firm transferred all its outstanding business, accounts and claims of every kind to the said corporation and this petitioner is now authorized under the laws of Great Britain to collect and receive all the claims and demands of said firm which were outstanding on the 12th day of September, 1899 and more particularly the claims and demands hereinafter set forth.

3. That on the 10th day of December, 1898, a treaty of peace between the United States of America and the Kingdom of Spain was concluded and signed by their respective plenipotentiaries at Paris, in the French Republic. Said treaty was ratified by the Senate and by the President of the United States on the 6th day of February, 1899, and by her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the city of Washington, in the District of Columbia, on the 11th day of

April, 1899, and on the same day the said treaty was proclaimed by the President of the United States.

4. That at the date of the ratification of said treaty, the military and naval forces of the United States had seized, occupied and were in possession of the town and port of Manila, in the island of Luzon. That under and pursuant to the terms of said treaty, the said island of Luzon, being part of the archipelago known as the Philippine islands, was ceded by Spain to the United States and the rightful possession thereof recognized, and such cession was accepted by the United States. That by said treaty Spain promised and agreed that it would evacuate the territory so ceded by it, which it thereupon proceeded to do. That at all times thereafter said island of Luzon, and particularly the said town and port of Manila in said island, have remained in the complete possession of the United States without interference by Spain or by any other power, and the United States has, since the date of the ratification of said treaty, exercised full administrative and legislative authority over said town and port of Manila.

5. That prior to the date of the signing of the said treaty of peace, the President of the United States made and issued a certain executive order, dated at the executive mansion in the city of Washington, July 12th, 1898, and published by the Secretary of War by order of the President, on the 13th day of July, 1898. The said order provided in substance that upon the occupation and possession of any ports and places in the Philippine islands by the forces of the United States, duties and taxes should be levied and collected upon articles imported into the Philippine islands from other countries, and upon articles exported from the Philippine islands to other countries at the rates and in the manner and subject to the regulations set forth and established by the customs tariff and regulations for the Philippine islands thereunto annexed.

Thereafter, by order of the Secretary of War, dated at the War Department, Washington, October 13th, 1898, and known as "Tariff Circular No. 18," it was orderd that the operation of said order of the President of July 12th, 1898, establishing a customs tariff and regulations for ports in the Philippine islands should be suspended until the 10th day of November, 1898, when the same should take effect and be in force, and that until that time the Spanish tariff as theretofore in force should be in force and duties collected thereunder. That in accordance with the last-named order on and after November 10th, 1898, the said tariff and regulations were put in force at the various ports of entry in the Philippine islands, and more particularly at the said port of Manila, in the island of Luzon. That the said customs tariff and regulations so established by the said order of the President, of July 12th, 1898, as modified by certain amendments thereof made by order of the President from time to time, remained in force at all the ports of entry in the Philippine islands, and more particularly at the said port of Manila from on or about the 10th day of November, 1898, until on or about the 15th day of November, 1901. That

during all of that period import duties were collected under the alleged authority of said orders and of said tariff by the military authorities of the United States upon articles imported and brought into the ports of entry in the Philippine islands from the ports in the several States and Territories of the United States, as well as from ports in foreign countries.

6. That said customs tariff and regulations for the Philippine islands provided, among other things, that every vessel on its arrival should be placed under military guard until duly discharged, and that no merchandise should be delivered until after the payment of the proper duties and charges thereon, when an order for the delivery of the merchandise should be issued by the proper military officer, and that any objection to the assessment of the duties must be filed by the importer before payment by him of the same, and that no refund of duties would be made thereafter, and that no delivery of imported merchandise should be made to the importer unless he had duly paid in cash the duties assessed thereon, and that any goods, wares or merchandise not duly entered for
5 payment of duty within ninety days after importation should be sold at auction by order of the commanding officer, and that the proceeds of such sale should be retained for ten days subject to the demand of the importer, after deduction of the proper duties on the goods and all expenses of storage and sale; and that all seized and confiscated goods should be sold in like manner.

The said tariff set forth the rates of duties on imports in certain schedules annexed thereto, and this petitioner begs leave to refer to the said customs tariff and regulations as established by the said orders of the President and to the amendments thereof, and to make the same a part of this petition as fully to all intents and purposes as if herein set forth at large.

7. That during the said period from November 10th, 1898, until November 15th, 1901, certain officers of the United States Army were designated under orders of the President to act, and did act as collectors of customs at the several ports in the Philippine islands, and particularly at the said port of Manila, and enforced the said tariff and regulations and collected duties thereunder at the rates thereby provided upon articles imported and brought into the ports in the Philippine islands, and more particularly the port of Manila from ports in the several States of the United States, at the same rates and in the same manner as upon articles imported from ports in foreign countries.

8. That at all the times herein referred to, before the 12th day of September, 1899, the said firm of Warner, Barnes & Co., and thereafter the petitioner, was and the petitioner now is, engaged in the business of a general commission, mercantile and trading house in the port of Manila and other ports in the Philippine islands, having its home office in the city of London, England, and correspondents in the city of New York, State of New York, and in many of the
6 principal ports in other States of the United States, and in other countries, and in the course of such business the

petitioner has imported a great variety of goods of all kinds from the ports in the several States of the United States, and more particularly the ports of New York and San Francisco, as well as from foreign countries, into the said port of Manila, and up to the 12th day of September, 1899, the said firm of Warner, Barnes & Co., and thereafter and prior to the 15th day of November, 1901, the petitioner, in the course of its business as aforesaid, imported from the ports in certain of the States of the United States, and more particularly from said port of New York, in the State of New York, and from said port of San Francisco, in the State of California, into said port of Manila, in the island of Luzon, certain merchandise and articles the growth, produce or manufacture of certain of the several States.

9. That upon the arrival at the said port of Manila, and at the other ports in the Philippine islands, of such articles, the growth, produce or manufacture of the several States, imported by and consigned to said firm of Warner Barnes & Co., and to the petitioner from the said ports of New York and San Francisco, and from other ports in the several States of the United States, the military officer of the United States then acting as collector of customs, and the subordinate military officers acting under his orders, took possession of such articles and placed them under military guard, in the manner provided for in said customs tariff and regulations and proceeded to assess and levy duties thereon at the rates thereby established, and refused to deliver possession of the same to said firm and to the petitioner until after the payment in cash of the duties so assessed and levied, and threatened in the event of the default in the payment of such duties to seize such goods with the military forces at their command and to sell the same for the payment of the duties, in the manner provided for by said customs tariff and regulations. And the said
7 firm and the petitioner respectively were thereupon obliged to and did pay, under duress, and in order to obtain possession of their goods, and in order to carry on their business as aforesaid, the duties so assessed, and upon such payment the said goods were released from the custody of the military authorities and delivered to the said firm and to the petitioner.

10. That the items of duties so paid by this petitioner to the military authorities at the port of Manila upon articles imported by this petitioner and consigned to it by Flint, Eddy & Company and Flint Eddy & American Trading Company, both of the port of New York, in the State of New York, between the dates of October 10th, 1899, and October 4th, 1901, amounting to seventy eight thousand five hundred and forty one dollars and seventy three cents ($78,541.73) Mexican silver, are set forth in the schedule hereunto annexed, made a part of this petition and marked "Schedule A."

That the items of duties so paid by said firm of Warner, Barnes & Co., and by this petitioner to the military authorities at the port of Manila upon articles consigned to them respectively by other correspondents at the port of New York and other ports in the United States, between the dates of December 13th, 1898, and October 25th,

1901, amounting to eighty-three thousand seven hundred and eleven dollars and fifty-six cents ($83,711.56) Mexican silver, are set forth in the schedule hereunto annexed, made a part of this petition and marked "Schedule B."

11. That after collecting the amounts of duties so assessed and levied upon the imports of said firm of Warner, Barnes & Co., and of this petitioner, the said military officers acting as collectors of customs during the period herein referred to, paid the same over to the United States, and said amounts of money are now in the possession of the United States.

8 12. That by the common law of Great Britain, and by the act of 23 and 24 Victoria, July 3, 1860, citizens of the United States of America have since had and now have the right to institute and prosecute suit in the form of a petition of right against the government of Great Britain for the recovery of money due, or other thing wrongfully withheld, and in such proceedings judgments may be recovered as in other cases according to the nature and extent of the relief to which the suitor is entitled at law or in equity.

13. That as the petitioner is advised by counsel, the proper construction of the said order of the President of July 12th, 1898, and of the customs tariff and regulations thereby established, as amended from time to time, is that they ceased to apply to all articles imported and brought into the several ports in the Philippine islands, and more particularly the port of Manila from ports in the several States of the United States, at the moment the United States ceased to be a foreign country with respect to the Philippine islands: that is to say, on December the 10th, 1898, the date when the said treaty of peace was signed. And that all the articles and produce so imported by the petitioner at said port of Manila, as specified in the annexed schedules marked respectively "A," and "B," were not subject to any import duties, and were entitled to free entry into the said port of Manila.

14. That as the petitioner is advised by counsel, the imposition and collection of said duties upon imports, from said firm of Warner, Barnes & Co. and from this petitioner at the port of Manila as aforesaid, in the amounts set forth in the schedules hereto annexed and marked respectively "A," and "B," were in violation of the rights and privileges secured to the petitioner as a subject of the King of Great Britain, under and by virtue of the provisions of the Constitution of the United States and of the treaties between the United States and the Kingdom

9 of Great Britain, and the laws of the United States, and that the collection of such import duties by the military authorities as aforesaid in the amounts specified in said schedules, or in any other amount, is unauthorized, illegal and in violation of the laws and Constitution of the United States and the treaties between the United States and Great Britain, and the petitioner claims that it is entitled to recover said moneys from the United States, and bases it claim thereto upon the United States Constitution and the said treaties and the laws of the United States.

15. That no part of the moneys so paid by the petitioner to the United States as aforesaid has ever been repaid to it by the United States, although payment thereof has been demanded. And by reason of the facts aforesaid the sum of one hundred and sixty-two thousand two hundred and fifty-three dollars and twenty-nine cents ($162,253.29) in Mexican silver so paid by said firm of Warner, Barnes & Co. and by the petitioner to the United States, or its equivalent, is now due to and owing the petitioner from the United States.

Wherefore, the petitioner demands judgment against the United States for a sum of money in United States currency equal to $162,253.29 in Mexican silver, and all proper relief in the premises.

HENRY M. WARD,
Attorney of Record for Claimant,
30 Broad Street, New York City.

10 STATE OF NEW YORK, }
County of New York, } ss:

Alfred De Buys, being duly sworn, deposes and says: I am an officer, to wit, vice president of Flint Eddy & American Trading Company, a Maine corporation, having its office and place of business at No. 25 Broad street, city of New York, State of New York, which corporation is the agent and correspondent in New York of Warner, Barnes & Company, Limited, the petitioner herein. I am familiar with the details of the petitioner's business above referred to. The greater part of said business was carried on in a large part by said Flint Eddy & American Trading Company, and the same was under my supervision. To the best of my knowledge, information and belief all the facts stated in the petition are true. No assignment or transfer of said claim or any part thereof, or interest therein has been made, and I believe the claimant is rightfully and justly entitled to the full amount named and stated in the said petition, after allowing all just credits and set-offs, if any.

The reason why this affidavit is made by me is that none of the directors or officers of the petitioner is at present within the State of New York, or the District of Columbia, and the only one of the directors or officers of the petitioner who is within any of the organized States or Territories of the United States, other than the Philippine islands, is Edwin H. Warner, who is now in the Territory of Arizona under medical treatment.

ALFRED DE BUYS.

Subscribed and sworn to before me this 17th day of January, 1902.

RALPH KIRBY,
[NOTARIAL SEAL.] Notary Public, Nassau County.

Certificate filed in New York county.

11

SCHEDULE A.

Summary of Duties Paid Flint, Eddy & Co. Import Account.

No. of declaration.	Vessel.	Origin.	Date of payment of duties.	Import duties.	Fines & penalties.	Storage.	Total.
			1899.				
7	Afghanistan	U. S. A.	Oct. 10th	$172.32	.....	.....	$172.32
69	Yuensang ..	do.	Nov. 24th	535.54	.....	.....	535.54
				$707.86	.....	.....	$707.86
			1900.				
1	Saint Bede..	do.	Feb. 9th	429.10	.....	.....	429.10
11	Afghanistan	do.	do. 9th	8.70	$1.45	.....	10.15
30	Diamante...	do.	do. 9th	20.20	.....	.....	20.20
2	Loostaaken .	do.	do. 21st	97.13	...	.....	97.13
3039	Diamante...	do.	May 18th	559.87	.....	.....	559.87
3219	Arlandearg.	do.	do. 19th	805.60	.....	.....	805.60
3215	do.	do.	do. 20th	271.59	.....	$3.32	274.91
2865 2868 2870	Armenia....	do.	do. 19th	1804.75	.....	.....	1804.75
3376	Palitana	do.	do. 31st	803.92	.....	.....	803.92
3709	Menmuir ...	do.	June 1st	3.02	.....	.....	3.02
4977	do.	do.	do. 13th	38.93	.....	.....	38.93
5108	Albenga	do.	do. 18th	391.33	.....	.....	391.33
5109	do.	do.	do. 22nd	1293.44	64.67	.....	1358.11
5370 5371	Diamante...	do.	do. 29th	147.90	7.40	.....	155.30
6416	Menmuir ...	do.	July 5th	42.34	6.16	.....	48.50
5570	Kurdistan ..	do.	do. 5th	241.97	.....	.....	241.97
6074	Indravelli ..	do.	do. 17th	1767.71	.....	.....	1767.71
6484	R. Castle ...	do.	Aug. 2nd	176.90	.....	4.25	181.15
6486	do.	do.	do. 9th	1206.03	.....	60.00	1266.03
B. 219 B. 220	Brand.....	do.	do. 23rd	4670.18	.....	.....	4670.18
B1616a	Saint Bede..	do.	Sept. 17th	4288.46	.....	.....	4288.46
B1615	do.	do.	do. 17th	149.39	.....	.....	149.49
B1632	do.	do.	do. 20th	752.03	.....	.....	752.03
B1624	do.	do.	do. 20th	240.26	.....	.....	240.26
B1625	do.	do.	do. 24th	65.49	.....	.....	65.49
	Carried forward			$20276.24	$79.68	$67.57	$20423.49
12	Brought forward			$20276.24	$79.68	$67.57	$20423.49
B-1633	Saint Bede..	U. S. A.	Sept. 24	745.45	.....	.....	745.45
B-1627	do.	do.	do. 25	88.43	.....	.....	88.43
B-1629	do.	do.	do. 26	361.65	18.08	.....	379.73
B-1634	do.	do.	do. 25	458.94	.....	.....	458.94
B-1630	do.	do.	do. 28	177.27	.....	.....	177.27
B-1628	do.	do.	do. 28	28.62	.....	.....	28.62
B-1636	do.	do.	Oct. 3	40.51	.....	3.93	44.44
B-1623	do.	do.	do. 3	31.31	.....	1.25	32.56
B-1618/22 B-1626 B-1635	do.	do.	do. 4	339.44	.....	.....	339.44
B-1631	do.	do.	do. 5	3791.54	.....	22.29	3813.83
B-1614 B-1616 B	do.	do.	do. 10	1769.72	.....	64.42	1834.14
B-2436	Yuensang ..	do.	do. 6	180.00	.....	2.21	182.21
B-4567	Glenturret..	do.	do. 23	4288.45	.....	.....	4288.45
B-4568	do.	do.	do. 23	637.34	.....	.....	637.34
B-4566	do.	do.	do. 24	2520.32	.....	.....	2520.32

SCHEDULE A—Continued.

No. of declaration.	Vessel.	Origin.	Date of payment of duties.	Import duties.	Fines & penalties.	Storage.	Total.
B–4560	Glenturret..	U. S. A.	Nov. 1	114.44	35.64	.....	150.08
B–4577	do.	do.	do. 1	44.35	.....	.....	44.35
B–4578	do.	do.	do. 1	6.72	.....	.....	6.72
B–4558	do.	do.	do. 1	164.16	.....	.....	164.16
B–4559	do.	do.	do. 1	505.68	.....	.....	505 68
B–4557	do.	do.	do. 1	40.04	.....	.....	40.04
B–4555	do.	do.	do. 1	433.88	.....	.....	433.88
B–4576	do.	do.	do. 1	536.65	.....	.....	536.65
B–4569	do.	do.	do. 1	95.00	.....	.....	95.00
B–4556	do.	do.	do. 3	1692.63	.....	.....	1692.63
B–4579	do.	do.	do. 8	294.60	131.25	.....	425.85
B–4575	do.	do.	do. 8	250.59	.....	.....	250.59
B–4554	do.	do.	do. 14	339.10	.....	.....	339.10
B–4573	do.	do.	do. 16	226.08	5.20	.....	231.28
13	Carried for ward ..		.....	$40479.15	$269.85	$161.67	$40910.67
	Brought for ward ..		.....	$40479.15	$269.85	$161.67	$40910.67
B–5825/6/8 B–5804/6 B–5788 B–5793/5	Glenartney .	U. S. A.	1900. Nov. 23	244.97	.....	.....	244.97
B–5784 B–5792 B–5809	do.	do.	do. 14	332.18	.....	.....	332.18
B–5802	do.	do.	do. 13	98.36	.....	.....	98.36
B–5827	do.	do.	do. 13	67.23	.....	.....	67.23
B–5822	do.	do.	do. 12	346.56	.....	.....	346.56
B–5817	do.	do.	do. 12	524.45	.....	.....	524.45
B–5810	do.	do.	do. 3	2144.33	.....	.....	2144.33
B–5803	do.	do.	do. 3	510.21	.....	.....	510.21
B–1013	Rokeby	do.	Nov. 17	231.45	136.99	.....	363.44
B–7897	Diamante ..	do.	Dec. 4	389.40	.....	.....	389.40
B–8031	Perla.....	do.	do. 4	7.80	.....	.....	7.80
B–9568	Folmina	do.	do. 29	282.61	.....	.....	282.61
B–9539	do.	do.	do. 29	351.62	.....	.....	351.62
B–9538	do.	do.	do. 29	667.19	.....	.....	667.19
B–9575	do.	do.	do. 29	168.84	.....	.....	168.84
B–9540	do.	do.	do. 29	235.62	.....	.....	235.62
B–9565	do.	do.	1901. Jan. 7	471.15	.....	.....	471.15
B–9567	do.	do.	do. 9	406.57	.....	.....	406.57
B–9573	do.	do.	do. 9	220.62	.....	.....	220.62
B–9537	do.	do.	do. 9	1752.41	.....	.....	1752.41
B–9562	do.	do.	do. 11	208.10	.....	.....	208.10
C–350	Gymerle ...	do.	do. 28	13.08	.....	.....	13.08
C–355	do.	do.	do. 28	797.24	.....	.....	797.24
C–342	do.	do.	do. 28	288.97	.....	.....	288.97
C–343 C–344 C–345–356 C–346	do.	do.	do. 28	2195.64	.....	.....	2195.64
C–348	do.	do.	do. 28	24.33	.....	.....	24.33
C–1957 C–1958 C–1948 C–1954	R. Castle ...	do.	Feb. 13	165.92	.....	.....	165.92
C–1951	do.	do.	do. 13	237.42	.....	.....	237.42
	Carried for ward ..		.....	$53863.42	$406.84	$161.67	$54431.93

SCHEDULE A—Continued.

No. of declaration.	Vessel.	Origin.	Date of payment of duties.	Import duties.	Fines & penalties.	Storage.	Total.
14	Brought forward	.....	.....	$53863.42	$406.84	$161.67	$54431.93
			1901.				
C-1951	R. Castle ...	U. S. A.	Feb. 13	237.42	.....	.....	237.42
C-1962	do.	do.	do. 13	395.56	.....	.....	395.56
C-1960	do.	do.	do. 15	519.63	.....	.....	519.63
C-1959	do.	do.	March 8	7.56	.....	.19	7.75
C-1963							
C-4160	Glenesk	do.	do. 21	2679.62	.....	.....	2679.62
C-4155	do.	do.	April 1	135.77	.....	.....	135.77
C-4149	do.	do.	do. 1	174.97	.....	.....	174.97
*							
C-4157	do.	do.	do. 10	69.29	.....	.....	69.29
C-6970	L. Castle....	do.	do. 26	187.13	.....	.....	187.13
C-6968							
C-6972	do.	do.	May 2	1804.78	.....	.....	1804.78
C-7902							
C-7907	Glengarry ..	do.	do. 8	568.98	.....	.....	568.98
C-7901	do.	do.	do. 8	51.51	.....	.....	51.51
C-7908							
C-7905	do.	do.	do. 8	226.38	.....	.....	226.38
D-161	Coulsdon ...	do.	do. 27	608.86	.....	.....	608.86
D-28	Perla.....	do.	June 8	2138.88	.....	.....	2138.88
D-155	Coulsdon ...	do.	do. 11	11.22	.....	.....	11.22
D-157	do.	do.	do. 11	57.14	.....	.....	57.14
D-154	do.	do.	do. 11	1744.82	.....	.....	1744.82
C-9230	Esmeralda..	do.	May 24	6045.36	302.27	.....	6347.63
D-2892							
D-2893	Puritan.....	do.	July 18	1574.60	.....	.....	1574.60
D-2894							
D-2893-a	do.	do.	do. 18	214.22	.....	.....	214.22
D-2891	do.	do.	do. 18	27.42	.....	.....	27.42
D-3789-2	Aragonia ...	do.	Aug. 14	509.58	.....	.....	509.58
D-3790	do.	do.	do. 17	271.41	57.35	.....	328.76
D-3791							
D-7909	Algoa	do.	Sept. 25	468.29	.....	1.94	470.23
D-6157	Longships ..	do.	do. 17	601.26	.....	.....	601.26
D-6160	do.	do.	do. 17	42.87	.....	.....	42.87
D-6159	do.	do.	do. 17	71.27	.....	.....	71.27
D-6163							
D-6164							
D-6165	do.	do.	do. 17	115.85	.....	.....	115.85
D-6166							
D-6167							
	Carried forward	.....	.....	$75425.07	$766.46	$163.80	$76355.33
15	Brought forward	.....	.....	$75425.07	$766.46	$163.80	$76355.33
			1901.				
D-6156	Longships ..	U. S. A.	Sept. 17	460.72	.....	.....	460.72
D-8278	Perla.....	do.	Oct. 4	279.22	.....	.05	279.27
D-9360							
D-9361	Claverdale..	do.	do. 9	426.97	.....	3.23	430.20
D-9362							
D-9364							
D-9365	do.	do.	do. 9	174.65	.....	3.36	178.01
C-4156	Glenesk	do.	April 4	130.34	.....	.....	130.34
	Duties 1899	.....	.....	707.86	.....	.....	707.86
				$77604.83	$766.46	$170.44	$78541.73

*C-4156 omitted. See page 5, last item.

16 SCHEDULE B.

Summary of Duties Paid Warner, Barnes & Co., Ltd., Import %.

No. of dec.	Vessel.	Origin.	Date of payment.	Import duty.	Fines and penalties.	Storage.	Total.
33	Esmeralda .	U. S. A.	Dec. 13, 1898	738.76	.....	.....	738.76
8	Tailee	do.	do. 22, "	3693.80	.....	.....	3693.80
49	do.	do.	Jan. 11, 1899	1.48	.....	.....	1.48
14	Yuensang..	do.	Mar. 1, "	5171.32	.....	.....	5171.32
52	do.	do.	do. 4, "	1.77	0.31	.....	2.08
16	Tailee	do.	do. 7, "	6074.08	.....	.....	6074.08
27	Esmeralda .	do.	do. 8, "	456.56	.....	.....	456.56
13	do.	do.	do. 23, "	101.20	.....	.....	101.20
24	do.	do.	Apr. 7, "	3690.11	.....	.....	3690.11
42	do.	do.	May 9, "	445.85	.....	.....	445.85
93	Diamante ..	do.	June 13, "	424.58	.....	.....	424.58
12	Esmeralda .	do.	Aug. 17, "	2259.16	.....	.....	2259.16
13	do.	do.	do. 17, "	754.67	.....	.....	754.67
19	Diamante ..	do.	Sep. 15, "	3013.54	.....	.....	3013.54
18	do.	do.	do. 15, "	751.41	.....	.....	751.41
14	Esmeralda .	do.	do. 29, "	515.44	.....	.....	515.44
41	Yuensang..	do.	Oct. 5, "	24.82	.....	.....	24.82
31	Nanyang...	do.	Nov. 3, "	1502.22	.....	.....	1502.22
2	Afridi	do.	Dec. 5, "	650.81	.....	.....	650.81
5	Nanchang..	do.	do. 9, "	758.81	.....	.....	758.81
6	Diamante ..	do.	Feb. 22, 1900	6004.66	.....	.....	6004.66
52	do.	do.	Mar. 13, "	1502.84	.....	.....	1502.84
3619	Menmuir ..	do.	do. 25, "	2911.07	.....	.....	2911.07
	Carried for	ward..	.....	.....	.....	.....	.....
17							
	Brought for	ward..	.....	.....	.....	.....	.....
5564	Kurdistan..	U. S. A.	July 5, 1900	643.66	.....	.....	643.66
5188	Diamante ..	do.	do. 5, "	7.56	.....	.....	7.56
B1023	Menuir	do.	Aug. 28, "	2252.36	.....	.....	2252.36
B3761	Yuensang..	do.	Oct. 1, "	2265.89	.....	.....	2265.89
B6270	Menmuir ..	do.	Nov. 6, "	2248.30	.....	.....	2248.30
B6782	Loonsang ..	do.	do. 15, "	1498.87	.....	.....	1498.87
B9281	Perla	do.	Dec. 11, "	1498.87	.....	.....	1498.87
B9621	Esmeralda .	do.	do. 18, "	749.43	.....	.....	749.43
B10480	do.	do.	Jan. 3, 1901	1498.87	.....	.....	1498.87
C457	Sungkiang .	do.	do. 16, "	1498.87	.....	.....	1498.87
C1348	Yuengsang.	do.	do. 19, "	749.43	.....	.....	749.43
C1815	Perla	do.	do. 30, "	2991.71	.....	.....	2991.71
C3112	do.	do.	Feb. 14, "	1124.13	.....	.....	1124.13
C5068	do.	do.	Mar. 23, "	2248.30	.....	.....	2248.30
C5941	Esmeralda .	do.	Apr. 9, "	2997.73	.....	.....	2997.73
C8876	Pitcairn ...	do.	May 9, "	6746.90	.....	.....	6746.90
D4864	Loonsang ..	do.	July 31, "	374.70	.....	.....	374.70
D5798	Perla	do.	Aug. 17, "	374.70	.....	.....	374.70
D7910	Algoa.....	do.	" 10, "	8993.14	.....	.....	8993.14
E284	Esmeralda .	do.	Oct. 25, "	1498.87	.....	.....	1498.87
							$83711.56

18 II.—General Traverse. Filed April 12, 1904.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.
W.

19 III.—Argument and Submission.

This cause was argued on April 13 and 14, 1904, and submitted.

20 IV.—Findings of Fact and Conclusions of Law. Filed May 5, 1904.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant above named, Warner, Barnes & Company (Limited), is a business corporation organized on September 12, 1899, under the laws of the Kingdom of Great Britain and now existing thereunder, and a subject of the King of Great Britain, and at the time of the filing of the petition herein had an office for the general transaction of its business in the borough of Manhattan, city of New York and State of New York, and another office for the general transaction of its business then and at all the times hereinafter mentioned at the port of Manila, Philippine islands.

II.

The claimant is the successor in business of the firm of Warner, Barnes & Co., a copartnership organized in England under the laws of the Kingdom of Great Britain, which said firm was, between the 10th day of December, 1898, and the 12th day of September, 1899, composed of Edwin H. Warner, Charles I. Barnes, and William R. Anderson, all British subjects. On or about said 12th day of September, 1899, the said firm dissolved and ceased to do business as a partnership and reorganized under the laws of Great Britain as a business corporation, the claimant herein, and thereupon all the outstanding business, accounts, and claims of all kinds belonging to said firm were transferred by operation of law under the laws of Great Britain to the claimant, and the claimant is now, under such laws, authorized to collect and receive all the claims and demands of said firm which were outstanding on the 12th day of September, 1899, and more particularly the claims and demands for duties paid

prior to September 12, 1899, embraced in the schedule annexed to the petition.

21 III.

The business in which said firm prior to September 12, 1899, and the claimant thereafter, were engaged is that of a general commission, mercantile, and trading house in the port of Manila and other ports in the Philippine islands. In the course of such business the said firm and the claimant imported a great variety of goods of all kinds from the ports in the several States of the United States, and more particularly the ports of New York and San Francisco, as well as from foreign countries, into the said port of Manila; and in the course of such business the said firm and the claimant imported on various dates between the 11th day of April, 1899, and the 10th day of November, 1901, a large quantity of merchandise and articles the growth, produce, or manufacture of the several States of the Union.

IV.

On the 10th day of December, 1898, a treaty of peace between the United States of America and the Kingdom of Spain was concluded and signed by their respective plenipotentiaries at Paris, in the French Republic. Said treaty was ratified by the Senate and by the President of the United States on the 6th day of February, 1899, and by Her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the city of Washington, in the District of Columbia, on the 11th day of April, 1899, and on the same day the said treaty was proclaimed by the President of the United States.

V.

During the existence of the war with Spain the President of the United States issued the following order:

"EXECUTIVE MANSION, July 12, 1898.

"By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine islands by the forces of the United States, the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied. Questions arising under the said tariff and regulations shall be decided by the general in command of the United States forces in those islands. Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder. Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

"WILLIAM McKINLEY."

This order war published by the Secretary of War on the 13th day of July, 1898. By order of the Secretary of War, dated October 13, 1898, known as tariff circular No. 18, it was ordered that the operation of said order of the President of July 12, 1898, should be suspended until the 10th day of November, 1898, when the same should take effect and
22 be in force, and that until that time the Spanish tariff which was theretofore in force should be enforced and collected thereunder. On or about the 15th day of November, 1898, the said order of July 12, 1898, was again put in force, pursuant to the order of the President, and continued thereafter in force, except as modified by certain amendments thereof made by order of the President from time to time, at all ports of entry in the Philippine islands until March 8, 1902, and during the continuance of the Philippine insurrection. This order was so promulgated and enforced by the President of the United States, by virtue of his authority as Commander in Chief of the Army and Navy of the United States during the continuance of the Philippine insurrection, as a war measure made necessary by the state of war existing in said islands as a result of said insurrection; and the consequent duties upon exports from and imports into the various ports of the Philippine islands, including the ports of Manila and Iloilo, were exacted and collected as a condition of the privilege of such exportations and importations and as military contributions to the support and maintenance of the military government then organized and enforced in said islands. The revenues thus derived went into the military chest or treasury of said military government in the Philippine islands, and were applied by said military government toward paying the expenses of said government in prosecuting the war against the insurgents and in maintaining and carrying on said government. None of the revenues so collected, including the duties herein claimed for, were ever paid into the Treasury of the United States or subject to the jurisdiction of any official of the Treasury Department of the United States.

VI.

The duties which are the subject of this claim were not levied nor collected pursuant to the general statutes of the United States relating to the customs administration, nor by virtue of the authority of any general tariff law of the United States, nor in the exercise of the civil powers of government of the United States, but were collected solely as a military contribution, exacted by the military government of the Philippine islands, and as a condition attached to the privilege of importing the goods upon which said duties were levied and collected into the Philippine islands, all by virtue of and pursuant to the executive order of July 12, 1898, above set forth, and the amendments thereto, and during the time when the cities of Manila and Iloilo, at which said duties were levied and collected, were in the military occupancy of the forces of the United States, as an incident to the war then existing in the Philippine islands.

VII.

The firm of Warner, Barnes & Co., between December 10, 1898, and September 12, 1899, and the claimant between September 12, 1899, and November 15, 1901, in the ordinary course of their business, brought certain articles of merchandise, the growth, produce, or manufacture of the several States, into the port of Manila from the ports of San Francisco, in the State of California, and of New York, in the State of New York.

23 VIII.

Upon the arrival of vessels at the port of Manila containing such articles of merchandise the military officer of the United States, then acting as collector of customs at that port, placed said vessels under military guard until they should be duly discharged, and no delivery of imported merchandise from such vessels was permitted to be made in said port of Manila to the importer until the duties assessed thereon had been duly paid. The said collector, upon the arrival of vessels containing such imported merchandise, preliminary to the assessment and payment of customs duties thereon, required the importer to enter said merchandise for payment of duty at the custom house within ninety days after importation. In this case it appears these regulations were conformed to.

IX.

The amount of duties so assessed and levied upon such articles of merchandise and so collected by the military collectors from the firm of Warner, Barnes & Co. between December 10, 1898, and April 11, 1899, is the sum of $9,964.69.

X.

The amount of duties so assessed and levied upon such articles of merchandise and so collected by the military collectors from the firm of Warner, Barnes & Co. and the claimant between April 11, 1899, and November 15, 1901, is the sum of $71,161.95.

XI.

Prior to the commencement on April 21, 1898, of the war between the United States and Spain, the long-continued disaffection of the native inhabitants of the Philippine islands against the Spanish rule had resulted in a revolution against the Spanish government in the island of Luzon, beginning in August, 1896. A condition of warfare resulted between the insurgents and the forces of the Spanish government, in which many thousand soldiers of the regular army of Spain were employed.

In May, 1897, the revolutionists proclaimed and endeavored to establish a Philippine republic, with Emilio Aguinaldo as president. In December, 1897, a treaty of peace was entered into between the

Spanish authorities in the Philippine islands and Aguinaldo, representing the insurgents in his capacity as such president, pursuant to which Aguinaldo and other leaders of the insurgents left the islands, and were in Hongkong, China, at the time that the crisis in the relations between the United States and Spain at the opening of the year 1898 was approaching. In February, 1898, hostilities had been renewed by the insurgents in the Philippines, who alleged that the provisions of the treaty of 1897 had been violated by the Spanish authorities, and a state of warfare then existed in the vicinity of Manila, with the rebel army a few miles from the city.

This state of affairs prevailed at the time of the declaration of war between the United States and Spain, and continued thereafter with increasing vigor up to and beyond the time of the suspension of hostilities which preceded the treaty of peace of Paris. Meanwhile Aguinaldo had returned to the Philippine islands and resumed
24 his leadership of the insurrectionary movement. In furtherance of this movement, a political organization was formulated for the administration of the affairs of civil government, and on June 18, 1898, Aguinaldo issued a proclamation establishing a dictatorial government. The government thus formed extended its operations throughout the archipelago, but more especially the islands of Luzon and Panay, and proceeded to displace the Spanish civil officials and usurp their official places and power. It induced and compelled general recognition of its authority and jurisdiction by the inhabitants of the territory outside of Manila, gathered together and organized large and formidable armies of insurgents, captured or expelled Spanish garrisons at various places throughout the islands, seized their arms and military equipment, and occupied their military works and defenses.

In September or October, 1898, the dictatorial government proclaimed and established by Aguinaldo assumed political form for emancipation from Spanish rule, and the feeling among the Filipinos was intense and general in its favor. The insurrectionary government thus formed made repeated demands for recognition on various officers of the United States forces then in the Philippine islands, which demands were refused.

At the time of the signing of the protocol at Washington, on August 12, 1898, an insurgent army, under command of Aguinaldo, closely invested the city of Manila, and at the time of the surrender of that city asked to be allowed to hold possession of the same from that time until the ratification of the treaty of Paris. This request was denied. In consequence of this denial and of the refusal of the officers of the United States to recognize the insurgent government and its alleged authority, there was much friction between the insurgent forces and the forces of the United States, and very pronounced unwillingness to submit to the authority of the United States was manifested by the insurgents.

This feeling on the part of the insurgents gradually grew into a strong sentiment of distrust of and animosity toward the United States Government, based upon the apprehension that the United

States Government would not, after the treaty of peace with Spain was ratified, recognize nor permit the independence of the Filipinos, and as a result the whole force of the movement which had been directed against Spain for the purpose of obtaining the independence of the Filipinos began to assume the same relations toward the United States Government for the same purpose.

This situation culminated in a declaration of war against the United States by Aguinaldo in behalf of the Filipino republic on February 4, 1899, and on the same day a battle took place between the army of the insurgents and the United States forces in Manila, resulting from an attack made by the insurgent forces, which attack had for its purpose the conquering and expulsion of the military forces and sovereignty of the United States from Manila and also from the Philippine islands. This attack was renewed by the insurgents on February 6, 1899, and again on February 10, 1899, with the same purpose in view. On February 22, 1899, a concerted uprising of the adherents of the insurrection in Manila was attempted, under instructions from officers of the Filipino government, to massacre all the Americans and Europeans in that city.

At the time of this commencement of hostilities between the forces of the insurgents and the United States forces, the army of the insurgents about and within the neighborhood of Manila numbered between 25,000 and 30,000, and was quite efficiently organized after the Spanish fashion, and the total forces of the insurgents at the time throughout Luzon were between 50,000 and 60,000. These forces the insurgents were in position to keep recruited to full strength on very short notice and without limit. The result of the hostilities thus commenced was a state of warfare throughout the Philippine islands, and especially in the island of Luzon and the island of Panay, which called into action in said islands the troops of the United States to the total number of 126,468 between February 4, 1899, and July 4, 1902. The number of troops engaged in military operations against the forces of the insurgents during that time and at different periods was as follows: In 1898, 22,073; in 1899, 29,722; in 1900, 69,420; in 1901, 67,393; in January, 1902, 36,944. The number of engagements between the respective forces during the continuance of said insurrection and consequent warfare was in 1899, 538; in 1900, 1,150; in 1901, 656; a total of 2,744. This warfare was carried on on the part of the insurgents through operations of various armies until November, 1899, when the plan was changed to a guerrilla warfare, and so continued until its close. This guerrilla warfare required more troops on the part of the United States from 1900 on than prior to that time, and necessitated the occupancy of a large number of garrisoned posts or stations throughout the Philippine islands by the United States forces, reaching the number of between 500 and 600. The number of deaths among the United States troops in the Philippine islands during this period from all causes was 4,374, and the number wounded in action was 3,022.

At the time of the armed insurrection above set forth, and the resulting warfare in the Philippine islands, there was a very general

sympathy on the part of the masses of the Filipinos, especially in the islands of Luzon and Panay, in favor of the insurrection and in support of the insurgent government, and at the time the Filipino government had sway throughout Luzon, throughout the Visayan islands, except Negros, and in northern Mindanao, and after February 4, 1899, the whole force of the movement which had been directed against Spain was directed against the United States. This sentiment of sympathy with and support of the insurrectionary movement was very strong in Manila, which was the center of activity upon the part of the insurgent leaders in the way of encouraging and aiding the insurrection. One form of aid of the insurrectionary movement and government was a contraband trade between merchants and traders in Manila, and the insurgents outside, in the course of which contributions were levied upon such trade by the officers of the insurgent government and paid by the agents of such traders. The general diffusion of this insurrectionary movement and of the sympathy of the Filipino people with the same, and their support thereof, continued practically undiminished and unaffected, even after the United States forces had taken possession of over 500 posts or stations throughout the islands. The result of this insurrectionary movement and the armed hostilities against the United States in the Philippine islands growing out of the same, as above described, was a state of war throughout the Philippine islands, which continued until July 4, 1902, when the same was officially declared to be at an end. During this time said islands were hostile territory.

26 XII.

The city of Manila was captured by the forces of the United States on August 13, 1898, and thereafter was held in military occupancy by the United States forces as an incident of the war with Spain until the treaty of peace at Paris concluded that war, and from that time as an incident of the insurrectionary war in the Philippine islands against the United States until the conclusion of the same. During the whole of the period of said insurrectionary war Manila was the base of the military operations of the United States troops in the island of Luzon and of supply for the maintenance of the military forces of the United States in the Philippine islands.

On February 11, 1899, as the result of a hostile engagement with an armed force of insurgents in the possession of the city of Iloilo, in the island of Panay, that city was captured by the military forces of the United States, and was thereafter, and until July 4, 1902, held in military occupancy by the forces of the United States as an incident of the insurrectionary warfare prevailing throughout the Philippine islands against the Government of the United States, and was the base of the military operations of the United States troops in said island of Panay, and of supply for said forces.

On the military occupancy of the city of Manila being established, an organization for the administration of the affairs of civil government by

military authority for the city of Manila and the Philippine islands was created and established. The jurisdiction of this military government was extended as rapidly as the success of the American forces and the exigencies of the military situation permitted. This military government was extended to and established in the city of Iloilo as soon as it was taken possession of by the United States forces. These military governments continued in force until July 4, 1902.

XIII.

The state of war in the Philippine islands above described was recognized and proclaimed by the executive officers of the United States at various times, for example:

President McKinley directed, on March 2, 1901, under the Spooner amendment (31 Stat. L., 910), that "power to govern the Philippines shall remain in the persons now exercising the same under the military government of said islands."

In a report dated March 18, 1901, in regard to the legality of an order for the deportation of George T. Rice to the United States, the War Department referred to a state of war then existing in the Philippines.

In a report dated May 3, 1901, the War Department referred to the insurrection in the Philippines as initiated by the battle of Manila on February 4, 1899, and as bringing on a state of war, which continued since then.

Secretary of War Root, in December, 1901, in passing upon the claim of Lieut. Horton W. Stickel, Corps of Engineers, for personal property thrown overboard from a transport in the Philippines, said: "The insurrection in the Philippines against the sovereignty of the United States and the authority of the government of the Philippine islands is of such a character and extent as requires the United States to
27 prosecute its rights by military force, and therefore creates a condition of war in said archipelago."

The military government, which on December 21, 1898, President McKinley ordered to be extended from Manila city, bay, and harbor to the whole of the ceded Philippine islands, was continued by the President during the existence of the insurrection in those islands; and the military officers, who were given the direction of said military government by order and authority of the President, put into force and execution various orders relating to the collection of internal revenue and of customs duties as acts of military necessity and according to the rules of war, including the continuance in force and the execution of an executive order published by the Secretary of War, by direction of the President, on the 13th day of July, 1898, providing for the levy and collection of import and export duties upon articles imported into and exported from the Philippine islands, which order was promulgated as a war measure incident to the then existing war with Spain.

XIV.

The existence of a state of war in the Philippine islands, from the time of the declaration of war by the Filipino insurgents, on February 4, 1899, and the commencement of the armed hostilities of the insurgents, on the same day, was recognized by the Congress of the United States, and the action of the Executive in establishing a military government in the Philippine islands and enforcing various war measures incident to that government, was recognized, ratified, and sanctioned by the Congress of the United States in various enactments.

Conclusion of Law.

On the foregoing findings of fact the court decides as a conclusion of law that the plaintiff can not recover, and that its petition be dismissed.

V.—Opinion.

WRIGHT, J., delivered the opinion of the court:

Plaintiff is a corporation organized under the laws of Great Britain and is a subject of that kingdom, and was, during the war between Spain and the United States, and the latter Government with the Filipinos, engaged as a general commission mercantile trading house in the port of Manila and other ports in the Philippine islands, and as a part of its business imported goods of various kinds from the United States, the growth, produce, or manufacture of the several States of the Union. As a result of the war with Spain the port of Manila passed to the control of the military authority of the United States, and by the exchange of ratifications of the treaty by the two governments concerned, April 11, 1899, the sovereignty possessed by the Kingdom of Spain in the Philippine islands was transferred to and accepted by the United States.

Previous to, at the time of, and after the treaty of peace there existed in the said islands an organized, armed insurrection against the lawful authorities therein, and on the 4th day of February, 1899, the organized military forces of the Filipinos, headed by Aguinaldo, began war against the United States forces in the Philippine islands, which continued
28 until July 4, 1902. At the time the war began the organized military force of the Filipinos was between 50,000 and 60,000, which force was kept recruited more or less effectively during the period of the war, and during the same period of time the United States had called into action troops to the total number of 126,468 to operate against the insurgent forces. During this war the total number of engagements was 2,744. The number of deaths from all causes among the troops of the United States during the war was 4,374, and 3,022 were wounded in action.

During the war with Spain the military authorities of the United States imposed certain tariff duties and taxes upon importations into the ports of the Philippine islands in possession of such military

authorities, and ordered the same to be levied and collected as a military contribution, which was accordingly done, and these levies and collections were by the same authority continued throughout the war with the Filipinos, until Congress, by appropriate legisla*l*ation, substituted their will for that of the military government. The revenues thus derived went into the custody of the military commander, and were applied by him toward paying the expenses of the then existing military government, and in the prosecution of the war against the insurgents. None of the revenues so levied and collected were ever paid into the Treasury of the United States, nor were they subject to the jurisdiction or order of any officer of the Treasury Department.

By this suit plaintiff seeks to recover of the defendant so much of the tariff duties as were levied and collected from it between the date of signing the treaty of peace between Spain and the United States and the exchange of ratifications thereof April 11, 1899, and for all so collected after the latter date until November 15, 1901.

Certain preliminary questions have been made by the defense herein, such as (1) the plaintiff's incapacity to sue in this court by reason of alienage to Great Britain in consequence of its corporate existence instead of being a natural person; and (2) the action is one sounding in tort, and of which we have no jurisdiction.

In respect to the first objection we are satisfied to determine it against the Government's contention on the principle that it has been frequently held, that for the purposes of jurisdiction a corporation is a citizen of the State in which its corporate capacity was endowed with existence, and by extending this qualification to the plaintiff we perceive no reason why it should not be regarded as a citizen or subject of Great Britain, thus enabling it to maintain this suit in view of the comity existing between the governments of the United States and Great Britain.

In respect to the second objection before noted, we think the decision in Dooley *v.* United States (182 U. S., 222), disposes of it favorably to the jurisdiction of this court.

We are now brought to consider the important question in issue upon which our judgment is invited, namely, whether exaction of the tariffs on importations by the plaintiff from the United States into the port of Manila, which were levied and collected by the military authorities, can be sustained. If such exaction was in a time of peace in the Philippine islands, when the civil law prevailed, or could be enforced by the civil authorities, and after the exchange of ratifications of the treaty of peace between the United States and Spain, it is not denied that under the authority of the insular cases, so called, the collection was illegal
29 for the reason that the United States was not a foreign country with respect to said islands within the meaning of the tariff laws of the United States.

The case then clears itself to the single question: If a state of war existed in the Philippine islands did that *ipso facto* justify the exaction of the tariffs that were collected? That such war did exist

before and after the exchange of ratifications of the treaty with an armed military power in said islands is beyond dispute, and whether such war was declared or recognized in a particular manner or not it seems to us is but to beg the question. All men must be held to intellectual honesty to see and know the things that are plainly given them to see and know. We have already shown that an organized armed military force of over 50,000 men was opposed to and contesting with the United States the right of sovereignty in said islands, the treaty with Spain to the contrary notwithstanding. To overcome this armed force the United States employed 126,468 of its military forces in 2,744 separate engagements; lost 4,374 of its soldiers by death from all causes, and 3,022 were wounded in action. Important belligerent rights were conceded to the insurgent forces, and the laws of war were applied to intercourse between them and the United States military forces. Their soldiers, when captured, were treated as prisoners of war, and not held for treason; and, generally, all things were done as if the war had been a public one with a foreign nation. If these facts do not prove the existence of a state of war, then they are futile for every purpose. Moreover, a sufficient statement for this purpose is that the President and the Congress did once and again recognize a condition of war in the archipelago, and applied to it the usual measures incident to the treatment of a public war, and did thus invoke all the military power and authority vested in the Government in the prosecution of such war.

A war thus recognized and prosecuted ought forever to set at rest the fact of its existence, and the acts of the legislative and executive authorities in that respect, subject to judicial notice, should be equally as binding upon the judicial department of the Government as upon the legislative and executive. Any decision to the contrary would have no effect except in the case in which it might be made, because the fact could not be so changed, and will exist in history as a fact for all future time.

The question of war is one to be determined by the political department of the Government. The *Protector* (12 Wall., 700), where the court, among other things, said: "Acts of hostility by the insurgents occurred at periods so various and of such different degrees of importance and in parts of the country so remote from each other, both at the commencement and the close of the civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the Government to fix the dates; and, for obvious reasons, those of the executive department which may be and, in fact, was, at the commencement of the hostilities, obliged to act during the recess of Congress, must be taken." (Williams *v.* Suffolk Ins. Co., 13 Pet., 415, 420; cited in Thomas *v.* U. S., 39 C. C., —.)

At the time the ratifications of the treaty of peace were exchanged, the treaty had thereafter the force of law, but by reason of the war

existing in the islands at the time, it failed to become effective, and it, as well as all other merely civil law, was suspended and superseded by military law, until such time as it might be possible to put the treaty and civil law in force, and establish proper administrative and judicial authorities to administer and enforce the same. The vital point is that until the military forces of the United States had suppressed armed resistance against its authority and established its sovereignty in the islands, the Government could not give the effect to the treaty contemplated by the high contracting parties. The case of Dooley, *supra*, and other insular cases, are not inconsistent with this view.

If the court had in mind the facts disclosed by this record, it could hardly have made a more pertinent exception than it did in the Dooley case, where it was said: "His (military commander's) power to administer would be absolute, but his power to legislate would not be without certain restrictions; in other words, they would not extend beyond the necessities of the case." No war existed in Porto Rico, into which the importation had been made, forming the subject of the Dooley case, nor had war existed there at any time. While the government there was for the time being in the military commander from the necessities of the case, yet he was not called upon to exercise the miltary authority incident to a state of war, nor did the necessities of the case demand the exercise of such power.

In time of war, within the military district of its operation, no restrictions are placed upon the power and authority of the military commander, except such as are imposed by the common consent of all civilized people. His power is absolute within the radius of his jurisdiction. He may prohibit or restrict all trade or commerce within his lines. As a condition to commerce within his military district he may impose contribution to assist in the expenses of the war or in giving such care to indigent noncombatants as humanity may require. These principles are, it seems to us, elementary and have their existence in long established and universal usage. They pervade the pages of history. Authorities are unnecessary to prove their existence, but recognition has been given them in Matthews *v.* McStea (91 U. S., 9); Prize cases (2 Black, 635); Hamilton *v.* Dillin (21 Wall., 73).

The tariffs paid by the plaintiff were not levied or collected by virtue of the general statutes of the United States relative to customs, nor by authority of any general law, nor in the exercise of the civil powers of the Government, the latter never having been in force in consequence of the prevailing war throughout said islands; but such tariffs were collected solely as a military contribution, exacted by the military government, and as a condition annexed to the privilege of importing goods upon which the duties were levied, and this is distinguishable from Diamond Rings (183 U. S., 176), where the question was as to the enforcement of the statute at Chicago, Ill., against property taken there from Luzon.

So far as appears from the evidence, the privilege of sailing away with its goods was not prohibited to the plaintiff, and while it does appear it was prohibited from landing the goods without first making payment of the duties, this does not deprive such payment of the nature of being voluntary. Plaintiff knew, or must be held as knowing, the military conditions that existed at the port to which it had sailed, and doubtless it made the importation in the expectation of having to pay the duties that were paid by it. The money was not covered into the Treasury
31 of the United States, but was applied by the military government toward its own expenses, in prosecuting the war against the enemies of the United States, and, so far as appears, the plaintiff acquiesced both in the payment and such use of the money.

We nave expressed no opinion concerning the effect of the ratification by Congress, so much discussed on the trial, of the acts of the commander in chief, deeming the question immaterial to the issue involved. In time of war the commander in chief has the same powers as other civilized governments, and the exercise of them needed no ratification to give them effective force.

Congress, however, by the act approved July 1, 1902 (32 Stat. L., 691), did provide as follows:

"SEC. 2. That the action of the President of the United States heretofore taken by virtue of the authority vested in him as commander in chief of the army and navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved: *Provided*, That nothing contained in this section shall be held to amend or repeal an act entitled 'An act temporarily to provide revenue for the Philippine islands and for other purposes,' approved March eighth, nineteen hundred and two.

"SEC. 3. That the President of the United States, during such time as and whenever the sovereignty and authority of the United States encounter armed resistance in the Philippine islands, until otherwise provided by Congress, shall continue to regulate and control commercial intercourse with and within said islands by such general rules and regulations as he, in his discretion, may deem most conducive to the public interests and the general welfare."

It follows, from the views we have expressed, that in our opinion the petition should be dismissed, and the judgment of the court is that it be done accordingly.

Nott, Chief Justice, and Howry, J., did not sit, and took no part in the decision of the case.

32 VI.—Judgment of the Court.

WARNER, BARNES & COMPANY, LIMITED,
v.
THE UNITED STATES. } No. 22757.

At a Court of Claims held at the city of Washington on the 5th day of May 1904, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimants, Warner, Barnes & Company, Limited, be and the same is hereby dismissed.

BY THE COURT.

33 VII.—Claimant's Motion for Additional Findings of Fact and Affidavit, Filed May 18, 1904, and Order of Court Overruling Same, December 5, 1904.

Now comes the claimant, Warner, Barnes & Company, Limited, by Henry M. Ward, its attorney, and moves the court that the findings of fact filed herein on the fifth day of May, 1904 be amended and supplemented by finding the requests to find heretofore submitted by the claimant, and numbered ninth, tenth, twelfth, thirteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second, pursuant to the affidavit of Henry M. Ward, verified May 16, 1904 and herewith submitted, and for such other or further order or relief as may be just and proper.

Dated May 16th, 1904.

HENRY M. WARD,
Attorney of Record for Claimant,
32 Nassau Street, New York City, New York.

To the honorable justices of the Court of Claims and the Honorable Louis A. Pradt, Assistant Attorney-General.

34 STATE OF NEW YORK, }
County of New York, } *ss:*

Henry M. Ward, being duly sworn, deposes and says:

I am counsel for the claimant in this suit. The claimant submitted twenty-two requests for findings of fact of which the defendant assented to and the court found the first, second, third, fourth, eleventh, fourteenth and fifteenth. The defendant also assented to the claimant's twelfth and thirteenth findings of fact, but the court embodied a portion of the claimant's twelfth request in its eight-finding and failed to find the claimant's thirteenth request. These two requests of the claimant and the eighth finding of the court are as follows:

"Twelfth. Upon the arrival of such articles of merchandise at "said port of Manila the military officer of the United States then "acting as collector of customs at that port and his military subor-

"dinates took possession of such articles and placed them under military "guard in the manner prescribed in said tariff and regulations, and pro- "ceeded to assess and levy customs duties thereon at the rates thereby "established, and refused to deliver possession thereof until after the "payment of such duties, and threatened in the event of default in such "payment to seize and sell such goods with the military forces at their "command for the payment of the duties, all in conformity with the "provisions of said customs tariff and regulations relating to similar "articles imported into the Philippines from foreign countries.

"Thirteenth. Said firm of Warner, Barnes & Company, and the "claimant during said respective periods were obliged to pay the amount "of such duties to the military collector in order to obtain possession of "said articles."

35 Eighth finding by the court:

"Upon the arrival of vessels at the port of Manila containing "such articles of merchandise the military officer of the United States, "then acting as collector of customs at that port, placed said vessels "under military guard until they should be duly discharged, and no "delivery of imported merchandise from such vessels was permitted to "be made in said port of Manila to the importer until the duties assessed "thereon had been duly paid. The said collector, upon the arrival of "vessels containing such imported merchandise, preliminary to the "assessment and payment of customs duties thereon, required the "importer to enter said merchandise for payment of duty at the custom "house within ninety days after importation. In this case it appears "these regulations were conformed to."

With respect to the twenty-first of claimant's requests which reads:

"Twenty-first. At any time during said period a column of three "thousand United States troops could have marched throughout the "island of Luzon without encountering any effective opposition."

The defendant stated as follows:

"The twenty-first of claimant's requests for findings of fact is not "objected to except that there should be added thereto: 'But the Fili- "'pino government nevertheless had sway throughout Luzon.'"

The defendant did not state whether it assented or objected to the claimant's twenty-second finding, which reads as follows:

"Twenty-second. Manila was never in the possession of the insurgents."

We submit that it is material to the issue.

Neither the 21st nor 22nd request was found by the court.

36 Of the remaining request for findings made by the claimant, we respectfully ask that the ninth request be found as submitted. This request embodies the material and relevant portions of the executive order of July 12th, 1898 under which the customs duties in suit were collected. The defendant objected to this request and to many others "on the ground that portions of the

same are not proven or are immaterial and that the material portions of the same are embodied in the defendant's request for findings of fact."

The Government embodied the enacting portion of the order in its fifth request which was found by the court, but the portion of the order which contains the regulations for the enforcement of the duties is material to the claimant's case, and we respectfully submit that the claimant is entitled to this finding in order that the issues of fact and law may be properly presented on an appeal. The portion of the request which the court did not pass upon, is as follows (after setting forth the enacting portion of the order):

"Upon the occupation of any ports or places in the Philippine islands "by the forces of the United States, the foregoing order will be proclaimed "and enforced.

"R. A. ALGER,
"Secretary of War."

"Regulations for the guidance of officers concerned in the collection of "duties on imports and exports, taxes and other charges and exactions "to be levied and collected as a military contribution at ports or "places in the possession of or under the control of the forces of the "United States in the Philippine islands.

"Every vessel shall be placed under a military guard until duly dis- "charged. * * * No delivery of imported merchandise shall be "made to the importer unless he shall have duly paid in cash the duties "assessed thereon.

"Coastwise cargoes shall be subject to duties the same as if coming "from a foreign port, except as to the trade between ports in the posses- "sion of the United States. * * *

37 "Any goods, wares or merchandise not duly entered for pay- "ment of duty within ninety days after importation shall be sold "at auction by order of the commandant after five days' public notice."

The schedules follow, and then this order closes:

"The foregoing schedules and provisions based upon the tariff and "taxing laws heretofore in operation in the Philippine islands, including "such other taxes and exactions heretofore collected, as in the discretion- "ary judgment of the commanding general shall be considered proper "and necessary, shall be and remain in force until duly modified, sus- "pended or revoked."

"At all times from November 10, 1898, to November 15, 1901, the "said tariff and regulations were enforced at the various ports of entry "in the Philippine islands, and more particularly at the said last port of "Manila, in the island of Luzon."

The claimant also submitted the following request which we submit is relevant to the issue:

"Tenth. During all of said period import duties were collected "under the alleged authority of said orders and of said tariff by the

"military authorities of the United States upon articles, the growth and "produce of the several States, brought into the several ports of entry in "the Philippine islands from the ports in the several States and Territo- "ries of the United States, as well as upon like articles imported from "foreign countries."

This was included under the general objection made by the defendant to the ninth request and others as above stated, but as this finding is not included in any of the facts found by the court we respectfully ask that it be found.

The sixteenth, seventeenth, eighteenth and nineteenth requests of the claimant are all material and relevant and while covered by the general objection of the defendant we submit that they should be found as undisputed facts. They are as follows:

38 "Sixteenth. The total amount of duties so collected was paid "over by said military collectors to the United States, and no "part thereof has ever been refunded to the said firm of Warner, Barnes "& Company, Limited, or to the claimant."

"Seventeenth. The government of Great Britain by the act of 23, 24 "Victoria, July 3, 1860, accords to citizens of the United States the "right to prosecute suits against the government, and in such suits "judgment may be recovered according to the nature and extent of the "relief to which the suitor is entitled at law or in equity.

"Eighteenth. During all the period from December 10, 1898, till "November 15, 1901, the port of Manila was open to the commerce of "all the world.

"Nineteenth. During said period the United States Government "encouraged and fostered commerce between Manila and the ports in "the States of the United States."

Of the remaining requests by the claimant, the fifth, sixth, seventh and eighth appear to be included in the requests submitted by the defendant and found by the court, but we respectfully submit that as each of these requests embodies a material and relevant fact, stated in concise form they should be allowed by the court.

All of which is respectfully submitted.

HENRY M. WARD.

Sworn to before me, this 16th day of May, 1904.

RALPH KIRBY,
[SEAL.] Notary Public, Nassau County.

Certificate filed in New York county.

Overruled.

December 5, 1904.

BY THE COURT.

39 VIII.—Claimant's Application for and Allowance of Appeal.

Now comes the claimant by its attorney and makes application for the allowance of an appeal to the Supreme Court of the United States from the judgment of this court entered and filed herein on the 5th day of May, 1904.

HENRY M. WARD,
Attorney for Claimant,
32 Nassau Street, New York City.

Filed July 21, 1904.

On the 15th day of December, 1904, the aforesaid application for allowance of appeal, filed July 21, 1904, was presented to the court by the attorney for claimants, and it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

40 Court of Claims.

WARNER, BARNES & COMPANY, LIMITED,
vs.
THE UNITED STATES. } No. 22757.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusions of law filed by the court; of the opinion of the court; of the judgment of the court; of the motion of the claimants for additional findings of fact, and order overruling same; of the application for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have *have* hereunto set my hand and affixed the seal of said court this 16 day of December, 1904.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: File No. 19,566. Court of Claims. Term No. 466. Warner, Barnes and Company (Limited), appellant, *vs.* The United States. Filed December 17, 1904. File No. 19,566.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO., LIMITED, appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

PETITION OF THE UNITED STATES FOR REHEARING.

I respectfully present to the court a petition for rehearing in this cause, and urge, in view of the paramount importance of the principles of sovereignty and constitutionality involved, that the court should hear

new and fuller argument from the Government for the following reasons:

I.

The court rested the decision in these cases upon the *Fourteen Diamond Rings* case. While accepting fully the ruling in that case, and the decision that the Philippine insurrection did not make the territory *foreign* as to our own tariff, the argument for the Government proceeded on the conviction that the imperative demands of the warfare in that domestic *hostile* territory and the scope of the executive power under the war head distinguish that case fundamentally from the present cases. The court holds here that the President's tariff order of July 12, 1898, expired by its own terms when the war with Spain was at an end. It is difficult to see why, because the exercise of the war power was initiated under a foreign war, it ceases at the end of that war and does not extend on into a much more serious war, simply because the territory was domestic. To entertain this view, it seems to me, is to disregard the doctrines laid down in the Civil War cases which unqualifiedly sustain the exercise of executive power for which the Government contends in dealing with an insurrectionary war in domestic territory

It is respectfully submitted that the Executive order was not "a power in blank for any military occasion which might turn up in the future," as suggested by the court. If subordinate officers took advantage of a President's order to wrest it from its true purpose as a blank power, this suggestion would be apposite. The

occasion demanded the continuance of the provisions of the order; the *post*-treaty aspect was an integral part of the entire situation in the Philippines, with its requirements and consequences fully foreseen, and was not therefore a casual sequel to suit which the order was being wrested from its true purpose with doubtful legality. The President consciously and intentionally imposed the order on the new war and was not misled into unknowingly giving an authority in blank. There can not be the slightest doubt about this. The commanding general and the subordinate officers acted at all times in strict accordance with the Executive orders.

It is suggested, with deference, that the court in the opinion herein did not lay down fully the legal and logical principles by which, notwithstanding the Civil War cases, the war power was limited to the existence of the war which first called it forth, and did not continue on into the far more serious and extensive war which followed, merely because the territory ceased to be "foreign." So much for the military necessity for the order throughout the period of insurrection. The deliberate continuance and the deliberate intent of Congress to approve, as shown by review in serial detail of executive and legislative acts, remain for consideration.

II.

The stress of the case appears now to rest upon the intention of Congress in the authorizing and ratifying acts and the effect of these acts. The Government is convinced, for many reasons which it desires to lay

more fully before the court, that Congress in passing these acts intended to ratify all that was done by the executive authorities in the Philippines, and particu larly the collection of duties during the period in question. The grounds for this view have already been stated, but are susceptible of reinforcement. Heretofore the Government has supposed that there could not be the slightest doubt of the intent of Congress; that the only inquiry was as to the effect of its enactments.

It will be necessary to set forth the series of executive orders on the one hand and the series of legislative acts on the other. The court is familiar with the terms of the President's tariff order of July 12, 1898. I point out first one or two orders consequent thereon *before* ratification of the treaty, in order to complete the showing of continuity of executive order throughout, followed by precisely responsive action of the subordinate officers.

Founded upon an order of the President, promulgated by the War Department, General Orders No. 6 of the military governor, dated Manila, September 29, 1898, suspended the enforcement of tariff regulations under the order of July 12, 1898, until November 10, 1898, and continued during the interim the existing Spanish tariff, omitting the preference to Spain.

General Orders No. 10 of the military governor of October 26, 1898, formally directed that the amended and revised tariff should be put in force on November 10, and set forth the regulations for the entrance and clearance of vessels, light dues, entry of merchandise, etc., with schedules of duties on imports.

The order of the President, dated December 21, 1898, and promulgated by the War Department January 16, 1899, as Circular No. 4 of the Division of Customs and Insular Affairs, contained this paragraph:

> All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons by due announcement of the military authority will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation.

While this contemplated the existing war with Spain, there is nothing in it inconsistent with its continuance during the necessary military situation which began before the war with Spain was definitely ended by the treaty ratification. Indeed, the war with Spain was really over when this order of December 21, 1898, was issued; the protocol was agreed upon August 12, 1898, and the treaty was signed December 10, 1898. That paragraph is harmonious with the fact of commerce partially opened to friendly nations, notwithstanding the insurrection, and is harmonious with the continued collection of tariff duties.

Other executive orders followed relating to the compilation of customs reports and additions to the Philippine free list.

After the treaty was ratified the action was as follows:

On May 3, 1899 (Tariff Circular No. 65, War Department, May 5, 1899), the President directed that

the Philippine Archipelago and the island of Guam shall constitute a collection district, with Manila as the chief port of entry, directed the assignment of an army officer as collector, established certain subports of entry, provided for the deposit of moneys collected with the treasurer of the islands, and that all questions arising in the administration of customs shall be referred to the collector for his decision, with the right of appeal to the Secretary of War. This order was promulgated at Manila, August 10, 1899 (General Orders, No. 37, of the military governor), and military officers were directed to "carefully consider and promptly comply with all instructions affecting them."

Two other orders at this particular time are also significant. On May 8, 1899, President McKinley signed an order, promulgated by the War Department on May 11 (Circular No. 20, Division of Customs and Insular Affairs), directing that "by virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States," certain offices shall be created and maintained "during the maintenance of the military government of the United States in the islands of the Philippine Archipelago and the island of Guam," including the office of assistant auditor for auditing the accounts of the Department of Customs.

On May 11, 1899 (Circular No. 16, Division of Customs and Insular Affairs), the War Department published for the information and guidance of all concerned the direction that—

> Collectors of customs appointed by the military authorities of the United States at ports in territory under military government are hereby directed to perform the duties formerly belonging to United States consuls or consular officers in such territory, so far as concerns seamen, vessels, clearances, etc.

Official fees and dues collected on this account were ordered to be deposited and accounted for as prescribed for customs collections.

General Orders, No. 49, of the military governor, dated October 23, 1899, provided as follows:

> The customs tariff and regulations promulgated in general orders of 26th of *last October*, from this office, having been amended from time to time since that date, the following revised printed schedule of the same, which contains all amendments to September 1, last, is published for the information and guidance of all concerned.

The President's letter of instructions to the Philippine Commission of April 7, 1900, transferred from the military governor of the islands to the Commission "that part of the power of government in the Philippine Islands which is of a legislative nature * * * until Congress shall otherwise provide."

> Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs duties, and imposts. * * *

It is entirely certain from the language of the President and the whole course of events that after the rati-

fication of the treaty and until September 1, 1900, "that part of the power of government in the Philippine Islands which is of a legislative nature" was exercised by the purely military authorities—that is, by the President acting through the officers of the Army. That was clearly the President's intention, understanding, and practice, founded on the belief that the war power was ample and its exercise necessary.

Various orders of the military governor promulgated from time to time, which need not be mentioned more specifically here, amended and revised the "United States provisional customs tariff and regulations for the Philippine Islands."

In the autumn of 1900 the Philippine Commission began to exercise its legislative power relative to the island tariff, and the separation of the civil from the military authority was initiated, the two authorities cooperating and sharing in the separation and evolution of the respective functions; e. g., General Orders, No. 16, military governor, dated February 15, 1901, promulgates certain regulations prepared under section 2 of the Philippine Commission's act of January 26, 1901 (1 Pub. Laws Philippine Com., p. 107), amending section 22 of the provisional customs tariff.

The act of February 28, 1901, of the Philippine Commission recites the order of the President of February 23, 1901, amending the order of May 8, 1899, already referred to, which provided for auditing officers, and enacts rules and instructions relative to the accounting system, "by authority of the President of

the United States and with the concurrence and approval of the Secretary of War first had," etc. This was the form of the enacting clause of the Commission's acts at first, which was changed by the act of Congress of July 1, 1902, to read: "By authority of the United States, be it enacted by the Philippine Commission."

On June 21, 1901, the President issued the order (promulgated in the Philippines as General Orders, No. 49, military governor, dated June 22) appointing the president of the Philippine Commission civil governor of the Philippines.

The transfer and cooperation of power is shown by military orders of July 20, 1901 (G. O., No. 179), and August 15, 1901 (G. O., No. 219). The former provided that in unorganized territory, as in organized provinces or parts thereof under military jurisdiction, revenue officers should discharge their duties as insular officers, reporting direct to the civil government. The latter directed that customs officers should be assisted in their duties by quartermasters' boats so far as possible without interference with the needful work of the Army.

In addition to the acts of the Philippine Commission above referred to the Commission passed two laws respecting the tariff up to the date of the act of Congress of March 8, 1902—a customs administrative act (February 6, 1902, 1 Pub. Laws Philippine Commission, 788), and an appropriation act which appropriated for the refund of "customs duties, fines,

penalties, and forfeitures mitigated or remitted by competent authority."

It does not seem possible to doubt the continuous intention of the Executive and the strict obedience of his subordinates respecting the war tariff. The duties on imports from the United States was always part of it.

During all the period of the war of the insurrection Congress passed laws which manifested their understanding of the situation in the Philippines and their approval of the necessary military measures taken to meet it. These were for the most part appropriation acts providing men and munitions, e. g., act of March 2, 1899 (30 Stat., 977, 981); act of March 3, 1899 (30 Stat., 1064); act of May 26, 1900 (31 Stat., 205); act of March 1, 1901 (31 Stat., 847); act of March 2, 1901 (31 Stat., 895).

The "Spooner Amendment" (act of March 2, 1901, 31 Stat., 910), which provided that "all military, civil, and judicial powers necessary to govern the Philippine Islands" should be "vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct," etc., manifestly related to the period *after* ratification and necessarily implied a recognition of the exercise of executive power, including the imposition of this tariff, before the passage of that act, and authorized and approved the continuance of the existing measures thereafter.

The act of March 8, 1902 (32 Stat., 54), "temporarily to provide revenue for the Philippine Islands,"

etc., continued in force the provisions of the Philippine Commission act of September, 1901, revising and amending the tariff laws of the Philippines, and specifically provided for the collection of duties upon articles coming into the Philippine Archipelago from the United States.

Thus the Philippine tariff, initiated under the original Executive order, and continued after ratification by similar orders, recognized and authorized by the Spooner Amendment, and adopted and established by the Philippine Commission proceeding under the amendment and their "Instructions," was expressly imposed and continued by Congress, with approving recognition of the fact that the duties had continuously theretofore been duly imposed.

The act of July 1, 1902 (32 Stat., 691), providing a civil government for the Philippine Islands, "approved, ratified, and confirmed" the action of the President in creating the Philippine Commission "and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission," etc.; approved, ratified, and confirmed the action of the President as set forth in his order of July 12, 1898, "together with the subsequent amendments of said order," and approved "the action of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments."

The opinion of the Supreme Court herein declares that in this series of authorizations and ratifications by Congress the only act needing mention is this final act of July 1, 1902; that the act ratifies the President's action, taken by virtue of his authority as commander in chief, and that the language, "the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved" is confined as to its approving force to those actions "which were in accordance with the provisions of the order, which, as we have already intimated, the collection of these duties was not."

There was no meaning or purpose in Congress ratifying what the commander in chief did under the war power during the Spanish war and up to the ratification of the treaty, because that action of the Executive needed no ratification, as the long-established rules of public law and the decisions of this court show. These settled doctrines were before Congress when the ratifying acts were passed. The act of March 8, 1902, which specifically imposed and continued the Philippine tariff, recognized by its terms that those schedules had continuously theretofore been imposed by the island authorities, and therefore when the act of July 1, 1902, ratified in such express and detailed terms the entire series of Executive acts, specifying the tariff collections, it is impossible to concede or conceive that Congress only intended to ratify what the Executive could validly do under the war power during the period

between the date of the Executive order in July, 1898, and the ratification of the treaty in April, 1899.

The opinion also says that the President's order "plainly was an order intended to deal with imports from foreign countries only and Philippine ports not in the actual military control of the United States." The order directs the collection of duties upon the occupation of any ports and places in the Philippine Islands. General Orders, No. 10, of October 26, 1898, which framed regulations and schedules, applied to *every* vessel and *any* cargo, and by specific language included within this category vessels from ports of the United States. By exempting from port charges and duties supplies and materials for the use of the United States, that order created a necessary inference that other merchandise from the United States was to be taxed—manifestly the bulk of army and navy supplies would come and did come from the United States.

All of the insular cases were decided by the Supreme Court long before the final validating acts of 1902. It seems very certain that by these acts Congress confirmed *all* the Executive actions in the Philippines. There can be no doubt that the President undertook to proceed respecting the Philippine tariff, and proceeded, after the treaty was ratified, precisely as he did before, and that at all times the military and civil governors, the commanding general, and the subordinate military and civil officers acted under and in accordance with the Executive orders with exact obedience and strict response to their terms. When these trans-

actions—that is, the actions of the Executive and the acts of Congress—are exhibited in their continuity and interdependence, to say that Congress did not *intend* to ratify what was done beyond the President's acts as commander in chief *during the Spanish war*, appears not to reckon with the facts. I repeat that Congress knew that *that* action of the Executive needed no ratification whatever, and therefore its action was a legislative approval of *all* the war measures continued after the treaty ratification, including the war tariff. The court will understand that the Government also rests (in this application for reargument) on the war power as competent during the whole period, and has sought to establish that ratification was not necessary at all. But at this point—after the treaty took effect—Congress, out of abundance of caution, might have conceived that some doubt existed, and legislated accordingly.

The Government earnestly desires the opportunity of arguing those propositions again and more at length before the court.

Without magnifying possible dangers, it is evident, I think, that while the opinion of the court strikes down only the tariff on merchandise from the United States, the legality of the entire structure of civil government after the ratification of the treaty is involved and may be denied hereafter relative to other features not now presented or foreseen, if the court adheres unqualifiedly to the logic of this opinion.

The court would not regard as controlling either the large amount of money involved or the fact that the

claimants added the duties to the price of their goods. But it is worth while to point out (as accentuating the great importance of this case) that the refunds called for under the decision of the court will reach the sum of seven million dollars, and that this vast sum will be paid in large part to claimants, many of them aliens, who, as public records show, were on the whole opposing rather than supporting the authority of the United States.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, John R. Bradlee, and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO. (LIMITED), appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF THE ATTORNEY-GENERAL ON PETITION FOR REHEARING.

The very heavy burden of millions of dollars which the decision in this cause previously rendered will impose upon the United States for money which never came into its Treasury, impels me to file an additional brief upon the subject of ratification alone. While I concur in everything the Solicitor-General in the main

petition for rehearing has said, it has seemed to me wise to bring to the attention of the court in a somewhat different way the facts of the case as throwing light upon the construction which the act of Congress of the 1st of July, 1902, must have. I therefore venture to invite the attention of the court to a review of the history of the period covered by the payment of these taxes and the confirmatory legislation.

STATEMENT OF FACTS.

On July 12, 1898, there then being a state of war between the United States and Spain in the Philippines, President McKinley, as commander in chief, directed that upon occupation of any ports or places in the Philippine Islands by the forces of the United States an accompanying tariff of duties and taxes should be levied and collected as a military contribution, and that regulations for its administration should take effect and be in force in ports and places occupied.

He required by this order that questions arising under the tariff should be decided by the commanding general of the forces in the Philippines, and that accurate accounts of the collections should be kept and rendered to the Secretary of War. On the 13th of August the city of Manila was captured, and the next day the custom-house was opened and taxes were collected according to the old Spanish tariff in force in the islands before the American occupation, and this tariff continued to be enforced until November 10, 1898. By order of the Secretary of War the order of July 12, 1898, was suspended until

November 10, 1898, when "the Customs Tariff and Regulations for Ports in the Philippine Islands in Possession of the United States" (substantially the same as those originally accompanying the order of July 12, 1898) were put in force. Such "Customs Tariff and Regulations," amended and revised, were issued by the military governor in General Orders No. 10, Manila, October 26, 1898, to take effect November 10, 1898.

These regulations expressly applied to vessels and cargoes from ports of the United States in respect of the production of a manifest certified by the United States collector at port of sailing. Section 19 imposed as a harbor charge a charge of 8 per cent on the value, as per schedule, of all merchandise, free or dutiable imported into the Philippines and 10 per cent additional on the amount of the import duty; "but merchandise imported or exported for the use of the Government of the United States, including coal, shall be exempt from this charge." Section 22 provided that all supplies and materials for the use of the Army and Navy of the United States should, under suitable restrictions, be admitted without payment of duty. At the close of the schedule of import and export duties was the following sentence: "The duty, percentum of duty, surtax, consumption, tonnage tax, wharf and warehouse charges, and all the charges herein provided for shall be collected in uniform manner regardless of the country of the origin or exportation of merchandise to Philippine ports in the possession of the United States, and all decrees and orders to the contrary are rescinded."

Under these customs and tariff regulations duties were levied on all goods coming into the Philippines from the United States except those which were exempt, as above quoted, and accounts of the collectors were regularly forwarded to the Secretary of War and the President, who never objected to the same. In December, 1898, the "Customs Tariff and Regulations" prescribed to take effect November 10, 1898, was amended, by striking out two words, by order of the military governor. On April 10, 1899, two months after the Senate ratified the treaty of Paris, nearly two months after the Queen Regent ratified the treaty for Spain, and only one day before ratifications were exchanged and the treaty was finally proclaimed, the acting Secretary of War, by direction of the President, added a paragraph to the "Customs Tariff and Regulations" for the Philippine Islands then in force, by virtue of the order of July 12, 1898. Is it possible that the President issued this order of April 10, 1899, intending its operation to cease the next day? Less than one month later, May 3, 1899, the President issued an executive order reciting that by virtue of the authority vested in him as Commander-in-Chief of the Army and Navy he directed that during the occupancy by the military authorities of the United States of the islands of the Philippine Archipelago and the island of Guam said islands should constitute a collection district for customs purposes. The order made Manila the chief port of entry and Iloilo and Cebu subports, provided for the detail of an officer of the Army as col-

lector, authorized the opening of subports from time to time by the Secretary of War, directed that all moneys should be deposited in the treasury of the islands, and ordered that all questions arising in the administration of the customs should be referred to the collector of the islands for his decision, with an appeal in cases referred by the collector, to the Secretary of War. Now, this order of May 3, 1899, is wholly ineffective and meaningless unless construed as an amendment of the order of July 12. It was issued by the President in the same capacity as Commander in Chief as that in which he issued the order of July 12, 1898. It referred to the duties to be collected in the ports in the occupancy of the military authorities of the United States, and it necessarily assumed the existence and continuing application of a tariff schedule which, of course, could only be the one accompanying and made part of the order of July 12, 1898, and amended as late as April 10 previous, by order of the President. Not only is this the natural and inevitable construction of the executive order of May 3, 1899, but it actually received that construction by the Secretary of War and military governor and was enforced as such by them, and they continued to assess duties on goods coming from the United States, as well as from elsewhere, not only with full knowledge and approval of the President, who made all these orders, but also, as we shall see, with the full knowledge of Congress. On October 23, 1899, the military governor, for convenience, published the "Cus-

toms Tariffs and Regulations" promulgated October 26, 1898, with all the amendments down to September 1, 1899, and added: "Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States not as yet in United States occupancy this order will be proclaimed and enforced."

By reference to Senate Document 171 (submitted herewith), which was a letter from the Secretary of War in response to Senate resolution of January 22, 1902, transmitting copies of all correspondence between the War Department or any official thereof and any person or corporation relating to the customs tariff affecting the Philippine Islands adopted by the Philippine Commission, we find an inquiry made of the Secretary of War by an American firm dated October 2, 1899, as to the duty imposed on American whisky entering the Philippine Islands, a reference of the inquiry by the Secretary to the military governor, and an answer by the collector of customs returned to the Secretary of War, that the classification undoubtedly discriminates against American whiskies of a certain class, but that it does not check their importation. The same document contains a petition, dated April 20, 1899, by American merchants in the Philippines to the Chamber of Commerce of San Francisco, asking a reduction of duties which had since American occupation been imposed on American goods imported into the islands, and complaining of discrimination against American goods. This petition was forwarded to the President, and by him referred to the War Department, and by it to the

islands, and returned with an indorsement, dated October 7, 1899, of the military governor, stating in effect that uniform duties were imposed on goods imported from Spain and the United States. The same document shows a continuing correspondence and discussion concerning the tariff between the military governor and the Secretary of War, extending from April, 1899, until June, 1900, when the Secretary of War directed the military governor to appoint a board to revise "the United States provisional customs tariff and regulations for those islands" (p. 34, Doc. 171—see also General Orders No. 80, June 9, 1900). The report of this board was transmitted to the Philippine Commission on the 29th of August, 1900 (see Doc. 171 p. 35), with the direction that the new tariff as recommended by the Commission should be submitted to the Secretary of War for his action, and after approval by him that a promulgating order would be issued putting it in force. December 29, 1900, the new tariff bill recommended by the Commission was forwarded by the chairman to the Secretary of War. That contained as its section 9 the following:

> Importations from the United States are dutiable under the provisions of this act, but no customs duties shall be imposed on articles, goods, and merchandise transported only from one place or port to another place or port in the Philippine Islands.

This was not introducing a new policy, but was only an explicit declaration of that which had been enforced under the existing a... The proposed tariff reached

the Secretary of War in February and was ordered printed by him. (Doc. 171, p. 159.) Then followed a long correspondence between interested American merchants and the Secretary of War in regard to the tariffs. In one of the letters to the chairman of the Philippine Commission (Doc. 171, pp. 284, 285), dated March 21, 1901, written by the Chief of the Insular Bureau, it is said, "Confidentially, I might add the Secretary does not desire any promulgation of the finally determined Philippine tariff before the decision of the Supreme Court in the Porto Rican case is handed down." On May 27 the Porto Rican cases were decided.

As soon as the opinion was received and construed, the Secretary of War sent June 28, 1901, the following cable dispatch (now on file in the War Department) to the chairman of the Commission at Manila:

JUNE 8, 1901.

TAFT, *Manila:*

Supreme Court holds that uniformity of duties clause of constitution does not apply to government of islands ceded by Spain; that Congress has power to impose customs duties on imports from Porto Rico, and that such duties levied under the Foraker Act are lawful. The court also holds that imposition of duties on merchandise imported from the United States into Porto Rico before the cession was a valid exercise of the President's power as military commander, and that the same duties imposed after the cession and before the passage of the Foraker Act were invalid, because the

United States having both title by cession and peaceable possession, Porto Rico ceased to be a foreign country within the terms of the Dingley tariff. The court did not decide the case raising the question of the power of Congress to impose duties in Porto Rico on imports from the United States, which is objected to as constituting an export tax in violation of Constitution, article 1, section 9. The court did not decide the case which raised the question of the right of the President to impose duties in the United States, under the Dingley act, upon merchandise imported from the Philippine Islands after the ratification of the treaty of Paris. The most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the court, is in the fact that Porto Rico was at the time of cession in full peaceable possession, while a state of war has continued in the Philippines.

As the question of the President's power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court, the President has determined to continue to impose duties as heretofore. We hope for further decisions by the Supreme Court shortly after it meets in October and before the meeting of Congress. The revision of the Philippine tariff, proposed by you, will be considered in a few days. The temporary suspension of legislation in Edwards's dispatch of June 1 is removed.

ROOT, *Sec. War.*

Sent straight 6.15 p. m. Sq.

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On the 3d of July, 1901, the Secretary of War, by order of the President, approved the new tariff bill prepared by the Commission and revised in the War Department and forwarded it to the Philippine Commission July 24, 1901. The tariff was finally enacted by the Philippine Commission September 17, 1901, and was put in force by its terms November 15, 1901. It was act No. 230 of the Philippine Commission and was entitled "An act to revise and amend the tariff laws of the Philippine Archipelago." The enacting clause is as follows: "By the authority of the President of the United States and with the approval of the Secretary of War first had, be it enacted by the United States Philippine Commission."

Section 1 of the act is as follows:

> SECTION 1. The provisions of General Orders No. 49, office of the United States military governor in the Philippine Islands, dated October 23, 1899, relating to customs duties on imports and exports of the Philippine Islands and tonnage duties and wharf charges therein, and the several orders supplemental thereto and amendatory thereof, are hereby amended to read as follows:

General Order No. 49 was an order promulgating the tariff duties imposed by order of the President of July 12, 1898, as amended and revised down to September 1, 1899. On the 2d of December, 1901, the case of the Fourteen Diamond Rings (183 U. S., 176), involving the right to impose duties on goods received from the Philippine Islands, was decided and no dis-

tinction was admitted to exist between the Philippines and Porto Rico. On December 13, 1901, the Ways and Means Committee submitted a Philippine tariff bill for enactment, with a report in which they said (H. R. Report No. 4, 57th Congress, 1st session):

> This bill is designed to raise revenue for the government and benefit of the Philippine Archipelago. It is intended to restore the status which existed prior to the late decision of the Supreme Court in the case of the diamond rings, rendered on the second day of the present month. Prior to that decision the Government had been collecting duties on goods coming into the United States from the Philippine Archipelago at the same rates as those provided in our tariff laws for like articles imported from "foreign countries." The court holds that the Philippine Archipelago is not a foreign country and therefore the general law does not apply. This bill extends the rate now existing upon imports from foreign countries to articles brought in from the Philippine Islands. In the Philippine Archipelago when it came into our possession under the treaty of Paris the Spanish laws for the collection of tariff were in force. These were continued with various modifications from time to time until the enactment of "An act to revise and amend the tariff laws of the Philippine Archipelago" by the United States Philippine Commission.

The same report was made by the Senate Committee on the Philippines, and thereafter, on March 8, 1902 (32 Stats., 54), Congress enacted "That the pro-

visions of an act entitled 'An act to revise and amend the tariff laws of the Philippine Archipelago,' enacted by the United States Philippine Commission on the 17th day of September, 1901, *shall be and remain in full force and effect*, and there shall be levied, collected, and paid upon all articles coming into the Philippine Archipelago from the United States the rates of duty which are required by the said act to be levied, collected, and paid upon like articles imported from foreign countries into said archipelago."

About the time of the passage of this act and for months thereafter evidence was taken by both Houses as to the conditions in the Philippine Islands, and it was made known to the House and Senate that suits were likely to be brought to recover moneys paid on goods imported from the United States into the Philippine Islands. (See hearings before House Committee on Insular Affairs, evidence of Wm. H. Taft, p. 139; hearings before Senate Committee on Philippines, evidence of William H. Taft, pp. 149–154.) The proceedings of the military governor, the Army, the Commission, the instructions to it by President McKinley, and all that was done in the islands under American occupancy were brought to the notice of Congress and special attention was given to the needs of the islands for income and the expenditures.

The instructions of the President to the Philippine Commission dated April 7, 1900, conferred *quasi*-civil legislative authority of wide scope upon the Commission as the legislature of a military government, and among other powers was this:

> Exercise of this legislative authority will include the making of rules and orders having the effect of law for the raising of revenue by taxes, custom duties, and imposts. * * *

Finally, as the result of six months' discussion and hearing, Congress passed on July 1, 1902 (32 Stats., 691), the act entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," and the first two sections were evidently intended to confirm and satisfy all that the President and his subordinates in the islands had done without Congressional sanction. The two sections were as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government

in said islands as set forth in the act of the Philippine Commission, entitled "An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

Future appointments of civil governor, vice-governor, members of said Commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

SEC. 2. That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, *together with the subsequent amendments of*

said order, are hereby approved, ratified, and confirmed, and the action of the authorities of the government of the Philippine Islands, *taken in accordance with the provisions of said order and subsequent amendments*, are hereby approved: Provided, That nothing contained in this section shall be held to amend or repeal an act entitled "An act temporarily to provide revenue for the Philippine Islands, and for other purposes," approved March eighth, nineteen hundred and two.

ARGUMENT.

The foregoing statment shows the facts and circumstances under which Congress passed section 2 of the act of July 1, 1902. The question was whether Congress had by section 2 ratified the collection of the sum sought to be recovered in this suit. Mr. Justice Holmes answers the question as follows:

> We see no sufficient ground for saying that the collection of these duties has been ratified by Congress. The only act needing mention is that of July 1, 1902 (chapter 1369, section 2, 32 Stat., 691, 692). The act ratifies the action of the President heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July 12, 1898, etc., together with the subsequent amendments to that order; and the actions of the authorities of the government of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments are hereby approved. Without considering how far the first part of the section

> extends, the approval of the action of the authorities is confined to those which were in accordance with the provision of the order, which, as we already have intimated, the collection of these duties was not. See further *De Lima* v. *Bidwell*, 182 U. S., 1, 199, 200.

It is difficult to follow the reasoning of the learned justice. The section approves "the actions of the government of the Philippine Islands" "taken in accordance with the provisions of said order *and subsequent amendments*." He says that "the approval of the action of the authorities is confined to those which were in accordance *with the order* which, as we have already intimated, the collection of these duties was not." With deference, the approval is not confined to those actions in accordance with the order, but is expressly and *ex industria* extended to include those which were taken in accord *with subsequent amendments*. Is it possible that actions taken in accord with subsequent amendments are to be excluded from the remedial effect of the statute because they were not in accord with the original order? Why add the words subsequent amendments at all? It is true the words are in accordance "with the said order *and* subsequent amendments," but I submit that it is an unheard of construction to treat "order *and* subsequent amendments" in any other than a distributive sense so that its meaning shall cover actions in accord either with the original order *or* its amendments. Look at the matter a little differently. Assume actions taken when the original order was in force in which case they

must have been in accordance with the original order to come within the ratification. Assume them taken when the order was modified by subsequent amendments in which case they must have been in accord with the order as subsequently amended. The order and subsequent amendments were not in force at the same time. The amendments necessarily modified the order and actions taken in accord with the amendments when in force were necessarily in accord with the order *and* the subsequent amendments, i. e., with the order as amended.

By previous discussion in the opinion the learned justice limits the effect of the original order of July 12, 1898, to the period of the war with Spain preceding the peace and construed it not to justify the imposition of duties upon goods coming from the United States, and so it followed if actions approved by section 2 were limited to those taken in accordance with the original order the duties in question were not within the ratification. It is very difficult to reconcile this construction of the order with the language of the schedule of duties which accompanied the order, and was as much the act of the President as the order itself, especially wherein it is recited as follows:

> The duty, per centum of duty, surtax, consumption, tonnage, tax, wharf, and warehouse charges and all the charges herein provided for, shall be collected in uniform manner, regardless of the country of origin or exportation of merchandise to Philippine ports in possession of the United States and all decrees and orders to the contrary are rescinded.

When this is shown to have been construed to justify duties on merchandise from the United States by every official from the President down, and even the complainants here have not contended otherwise, for they have brought no suit for taxes imposed during the war, it makes the meaning of the language still more clear.

But even conceding such a construction of the order of July 12, 1898, to be correct (though, as we have seen, it is in the teeth of the actual construction which the President put on it), on the ground that only in this way can the action of the President be squared with his lawful powers, we must abandon this rule of construction when we come to consider those subsequent amendments of the order that were, according to the opinion of the court, plainly *ultra vires* and not to be reconciled with his powers. As we have seen, the President, through the Secretary of War, amended the customs regulations under the order of July 12, 1898, by order of April 10, 1899. Then the treaty had been ratified by both powers and these ratifications were to be exchanged the next day. Is such a Presidential order consistent with the view that he intended the amended order to cease to have effect the next day?

Take again the order of May 3, 1899, which plainly continued the order of July 12, 1898, modifying it in some respects, but giving force to its schedules long after the Spanish war had ended and the treaty of cession was ratified. What construction is that to have for purposes of ratification but the construction

which President McKinley intended it to have, what his officers gave it with his knowledge, and what he subsequently approved as the proper construction. Under such circumstances it is, of course, impossible to restrain the meaning of an order from its natural one to square with delegated authority when the conflict between the two is irreconcilable by reasoning however strained. The only conclusion is—indeed the natural conclusion is—that the legislative power recognizing the lack of authority intended to supply it by ratification. I confess myself unable to see why the court should decline to follow what is so plain that he that runs may read. We must then have recourse to the ordinary rule of construction which is to follow the intention of the person making the order, and when we can ascertain his intention by what was done under the order with his approval we are clearly right in adopting that as its true meaning. The statement of facts will have utterly failed in its purpose if it does not show that by the order of May 3, 1899, the President intended to amend the order of July 12, 1898, by treating it in force after the war and by continuing it with a few amendments, that he intended thereby to impose duties on goods coming from the United States and that the collection of duties accordingly was known to him and approved by him. Furthermore, the statement of facts shows that Congress knew of these subsequent amendments to the order of July 12, 1898, and knew that the President had intended the collection of the taxes as they were collected on goods coming from the United

States. In the light of these facts known to Congress, it is impossible to construe the Congressional approval of section 2 as covering less than the collections made under the subsequent amendments to the order of July 12, 1898, with the approval of the President, or the taxes in suit.

The question of ratification is a question of intention to be determined by the language of the ratification in the light of the circumstances. Congress was here ratifying an order of the President, and its amendment and acts done in pursuance of them. Acts done in pursuance of a President's order are usually those acts which the President intended to authorize, and when the facts show that he actually approved the acts done they tend strongly to show that he intended to authorize them, and therefore that they were intended to be ratified by Congress.

I ought to add that a narrow construction of section 2 is wholly unjustified when the character of the legislation of which it is a part is considered. Congress was fully advised that President McKinley, both in Porto Rico and in the Philippines, was without guide or precedent in his policy; that he had to pioneer; that, while Congress came to his rescue early in respect to Porto Rico, he was left substantially for three years without Congressional assistance, and that in carving a path through a new forest, in assuming responsibilities which he could not shift, he might have adopted, and, in the light of the decisions of this court, he did adopt methods which

were beyond his powers for want of Congressional sanction. When Congress examined closely what he had done, it approved and it determined to make up for its lack of aid and its hardly excusable timidity in action by a generous ratification of what he had done. This is perfectly plain from the first section, and I submit it is wrenching the plain purpose and meaning of Congress in dealing with the second section to use dialectics to prevent its having any meaning or force at all.

The reasoning of the opinion certainly justifies the conclusion that it was not intended to put the decision of this case on the ground that Congress could not ratify by subsequent act the collection of the duties here sought to be recovered. It is true that in the case of *De Lima* v. *Bidwell*, to which reference is made in this opinion, there is an *obiter dictum* to the effect that Congress could not ratify the collection of taxes imposed without previous authority after a suit had been brought to recover such taxes. It is submitted that under the decisions in the case of *Mattingly* v. *District of Columbia* (97 United States, 687), and in *Hamilton* v. *Dillin* (21 Wallace, 73, 96), it is distinctly ruled that Congress has the power to validate the collection of taxes which were invalid by reason of a failure of Congress to act when collected. If this be true, then it is respectfully urged that there is no logical distinction between the ratification of the collection of such taxes before and after suit brought. The objection can not be that the ratification after suit brought disturbs

vested rights to recover the taxes, because the right is just as much vested under principles of constitutional law before as after suit brought. The bringing of a suit does not change the nature of the right, and it is not until judgment is recovered that its nature can be said to be changed. The real ground for the decision in *De Lima* v. *Bidwell* was that sustained by the authorities cited, to wit, that the presumption in respect of ambiguous legislation claimed to affect previously existing rights is ordinarily against its being retroactive; but such presumption of course can not obtain in case of an express ratification like this on its face intended to be retroactive. It is submitted that the real limitation upon the power of Congress to ratify the collection of taxes, or any other act as against third persons, is that between the time of the unauthorized act and of the ratification nothing shall have occurred changing the situation of the person affected by the ratification, so that by reason of the ratification he is put in a worse position than he would have been if the act had been previously authorized. If not, there would seem to be no reason why ratification should not have its full operation; and in this case and in this class of cases there is the strongest reason why ratification should apply. Here what is protested against, and what is sought to be made the basis of the recovery, is a general construction of a customs law having the effect of raising the prices of goods imported so that the plaintiffs, the merchants who are importing them, have been able to reimburse themselves for the

duties paid in the additional price of the goods. It is no hardship on them, therefore, that the taxes, though originally erroneously assessed, should be made legal by subsequent enactment; and the mere difference between a right to recover before suit brought and after suit brought makes an arbitrary distinction with no logical foundation at all.

Even if we assume that the distinction suggested in *De Lima* v. *Bidwell*, as to the lack of power of Congress to ratify the collection of taxes after suit brought in assumpsit to recover them back is sound and that the judgment herein should therefore be for the complainants, it is nevertheless of the utmost importance to the Government that this be established as the real ground for the decision rather than a construction of the second section of the act of July 1, 1902, as not intending to ratify the collection of taxes like those in suit; a construction which we hope we have shown and respectfully contend to be unsupported by the facts and the law. The reason for the importance to the Government of the ground upon which this case is to be decided, if it must be decided in favor of the complainants, is that there are doubtless claims amounting to more than a million dollars, on which suit was not brought before July 1, 1902, the date of the ratifying act, but upon which suits have been and will be brought in view of the present decision of the court. For these reasons we think it of the utmost importance to the Government that an opportunity should be given for a reargument,

in which the question of construction and ratification may be given a much fuller consideration, in view of all the history of this legislation, than, as it is respectfully submitted, it has heretofore had.

WILLIAM H. MOODY,
Attorney-General.

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Clerk.

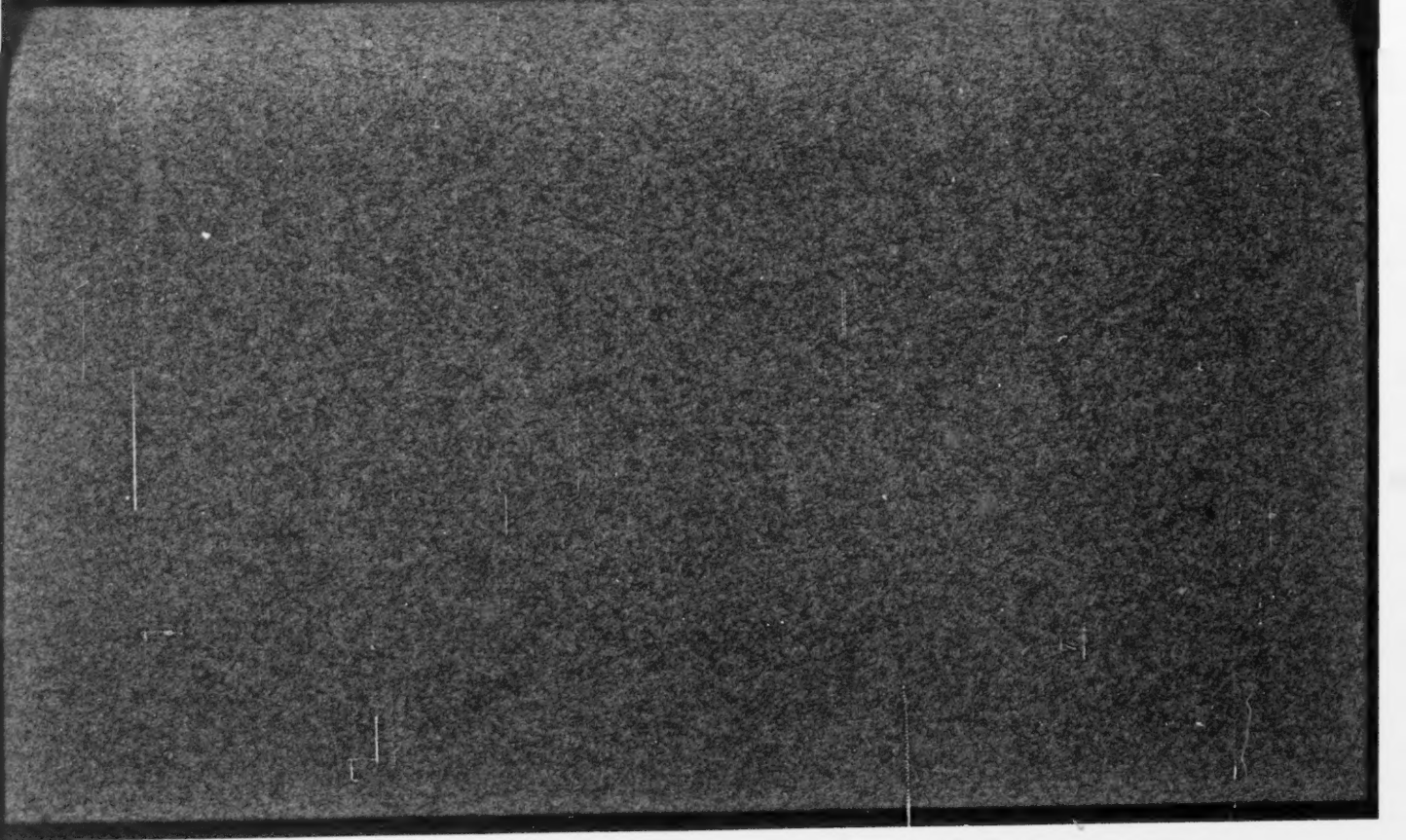
In the Supreme Court of the United States

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. — No. 149.

WERNHER, BARNES & Co., LIMITED, APPELLANT,
v.
THE UNITED STATES. — No. 466.

REPLY BRIEF ON PETITION FOR REHEARING.



In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error, *v.* THE UNITED STATES.	No. 149.
WARNER, BARNES & CO., LIMITED, APPELLANT, *v.* THE UNITED STATES.	No. 466.

REPLY BRIEF ON PETITION FOR REHEARING.

The opposing briefs refrain from discussing the point about protest, on the ground that it is outside the order of the court and that it has nothing to do with the power to ratify. We are well satisfied to leave that matter as it now stands. It is manifest, as we have said, that since our adversaries claim a vested right, which affects the power to ratify, the failure to protest is an essential factor in that question and is therefore fairly open to discussion.

Notwithstanding their self-denying ordinance, however, counsel freely discuss again the intention of the Executive, which is no more closely connected with the inquiry as defined by the court than the failure to protest.

We submit that the strength of the argument in favor of the *power* of Congress to ratify is not weakened by the briefs filed for claimants. We think also that our argument on the intention of Congress rests established, unshaken by our opponents; but a few more suggestions on both points will be appropriate.

It is impossible to concede that the *President's intention* in the original order of July, 1898, is to be resolved into a mere feat of verbal construction. The will of the Executive can not be thus separated from the document, and the will that made the document be nullified by a gloss of its language. We do not mean that the will must prevail; we are not looking back to the war power in the least. What we mean is that the Executive will and meaning as it existed before and after the treaty of peace must be construed by the executive acts as well as words. Now, there can be no doubt what the Executive thought its own words meant, and there can be no doubt that the Executive before and after the treaty was ratified collected duties on goods entering the Philippines at Manila and elsewhere from the United States as from foreign countries, believing that it had the power to do so, and that the intention to do so was well expressed in the order and its amendments.

We remind the court that among other orders after the treaty ratification, General Orders No. 49 of the military governor, dated *October 23, 1899*, revised and promulgated again *in integro* the tariff and regulations as promulgated October 26, 1898, which contained provisions regarding manifests expressly applying to vessels and cargoes from the United States, and provided that all supplies and materials for the use of the Army and Navy of the United States should be admitted free of duty, i. e., providing that other merchandise from the United States should be taxed, as was notoriously done.

The meaning of this is clear, and the inference as to purpose irresistible. We submit that, tested by the language itself and by the meaning and purpose of words as shown by acts, it is impossible to question the intention of the Executive in the original order as it was continued, although, of course, the court has now adjudged that the Executive carried out that intention without authority. It is true that, looking at the order at the start and from the point of view of a scholiast criticism, the Executive did not *foresee* on July 12, 1898, that the war with Spain would end in less than a year, and that there would be a domestic insurrection, and that, believing in the validity of his war power, he would have occasion to continue, enlarge, and amend the terms and effect of his order; but this fact does not affect the *intention* of the Executive as shown in the evolution of these transactions.

The opposing argument applies this same sort of subtle distinction and refinement to the language of the act of July 1, 1902. They say that the clauses, "action * * * taken by virtue of the authority * * * as Commander in Chief * * * as set forth in his order * * * together with the subsequent amendments of said order," and, "the actions of the authorities * * * taken in accordance with the provisions of said order and subsequent amendments," must mean action falling strictly within the limits of the war power as now determined by this court; that otherwise, since the court has determined that tariff collections after April 11, 1899, were not authorized by the order, Congress would be ratifying not what was in accordance with the order, but what was disaccordant, which is inconsistent with its own words.

Let us scrutinize this notion of the terms of section 2.

At the time this act was passed Congress knew that the executive authority in the Philippine situation was doubtful, because the *Diamond Rings* case had decided that duties could not be levied here on merchandise coming from the Philippines. But Congress did not know until the present case was decided last spring that the war authority of the Executive throughout the whole Philippine situation (in the tariff field), after the treaty ratification, was not only doubtful, but was entirely without foundation. Can any reasonable man suppose that, because of the language quoted from section 2 of the act, Congress meant carefully to delimit and separate

the authorized from the unauthorized action of the Executive; that Congress meant to say: "We ratify the action taken by the Executive respecting the Philippine tariff only so far as it now appears to be, or may hereafter turn out to be, valid and constitutional without any ratification from us;" that Congress meant to say "We ratify what you did, so far as the Supreme Court determines you had a right to do it"?

The action of the President was taken by virtue of his authority as Commander in Chief. That is to say, what he did was *initiated* by an order which was valid by virtue of such authority when he promulgated it and for some time thereafter. The actions of his subordinate authorities were taken in accordance with the provisions of said order and subsequent amendments in the same sense. The words "subsequent amendments" present destructive criticism to our opponents, as we have pointed out, and notwithstanding their dialectics, for no distinction is intimated between subsequent amendments before and after April 11, 1899, and every amendment drew forward and continued the whole scheme to its date. The claimants' argument seeks to have the court regard the case as if, with the first amendment after the ratification of the treaty or with some subsequent amendment, the President had said: "This tariff order with its amendments heretofore prescribed shall cease hereafter to apply to vessels or merchandise arriving from the United States."

Congress, in section 2 of the act of July 1, 1902, was concerned merely to identify, as preliminary to its

confirmation, in due legislative form, the subject-matter of the enactment, viz, the tariff set forth and established by said order and the origin of its imposition by virtue of the authority of the Commander in Chief. Similarly, in the later portion of the section Congress approves the actions of the authorities, and to specify *what* actions, so as to limit the confirmation to that particular field, viz, of the tariff, defines the actions as taken in accordance with the provisions of the said order, which is merely a more formal way of saying taken *under* or *in pursuance of* said order. Congress meant, and said in effect, "the action taken by the President, as Commander in Chief"—the longer expression is mere formality and artificiality of language. Congress certainly did not mean to say, "action only so far as taken by virtue of valid constitutional authority," or "if the action taken was not by virtue of authority, then we do not confirm." We think it is manifest that Congress said, in effect: "What the Executive did under its provisional tariff, in pursuance of constitutional authority, as was supposed, is hereby approved."

The Executive was endeavoring in good faith to perform a duty imposed upon him by the law, public and municipal. He went beyond the strict line of his legal power and authority in performing such duty. Did Congress mean to approve what was plainly within the strict line or what exceeded?

In short, two views alone are possible—one, that Congress meant only to approve what the Executive

should be judicially determined to be empowered to do under the constitutional grant and to administer a rebuke respecting authority exercised outside or beyond the limit thus judicially defined; the other, that Congress, knowing what the Executive acts were and what the doubts as to his power, meant to approve broadly, as we contend; intending actions originated by the order and taken under it to be confirmed even if it turned out that for part of the time the actions were not "by *virtue* of the authority" of the war power or "in *accordance* with the provisions of said order and subsequent amendments," as now technically construed; intending this excess of authority, honestly assumed for legitimate purposes, to be ratified even if that authority was exercised (strictly speaking) by color of rather than by virtue of the constitutional power. We can not think it doubtful which of these two views of the real intention of Congress is sound and should prevail.

WM. H. MOODY,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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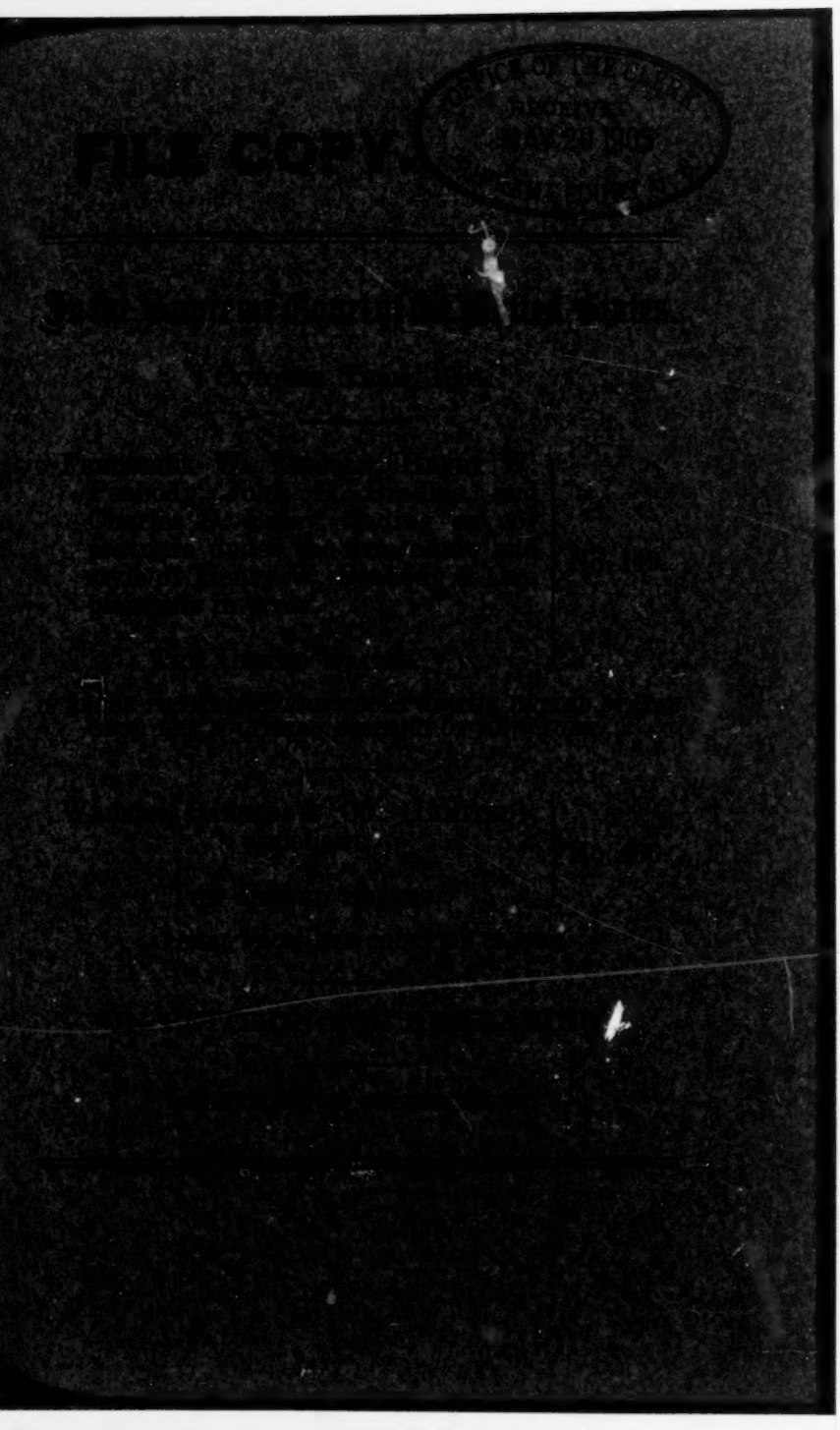

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. Peabody, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as co-partners under the firm name and style of HENRY W. PEABODY & CO., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO. (LIMITED), appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

ON PETITION FOR REHEARING.

STATEMENT OF CLAIMS FILED.

We submit to the court the following statement of claims filed, which would come under the decision herein, for refund of duties. The clerk of the Court of Claims states that this list is complete

and accurate to date. It is evident that additional claims are being presented from day to day. The list is arranged to show the aggregate of claims up to July 1, 1902, and the aggregate of claims since that date and up to the present time.

CLAIMS FILED UP TO JULY 1, 1902.

22757. Jan.	18, 1902.	Warner, Barnes & Co	$162, 253. 29
22758. Jan.	20, 1902.	Warner, Barnes & Co	326, 386. 62
22760. Jan.	25, 1902.	Smith, Bell & Co	1, 216, 000. 00
22761. Jan.	25, 1902.	Smith, Bell & Co	4, 000. 00
22762. Jan.	25, 1902.	Smith, Bell & Co	445, 000. 00
22763. Jan.	25, 1902.	Smith, Bell & Co	244, 000. 00
22808. Feb.	27, 1902.	Guiterrez Hermanos	138, 939. 97
22809. Feb.	27, 1902.	Juan B. Gomez	19, 753. 75
22810. Feb.	27, 1902.	Juan B. Gomez	3, 127. 09
22812. Mar.	3, 1902.	Warner, Barnes & Co	700. 00
22813. Mar.	3, 1902.	Warner, Barnes & Co	2, 104. 00
22816. Mar.	5, 1902.	Perez & Co	1, 400. 00
22817. Mar.	5, 1902.	Perez & Co	16, 000. 00
22823. Mar.	13, 1902.	Ker & Co	180, 000. 00
22824. Mar.	13, 1902.	Ker & Co	131, 000. 00
22825. Mar.	13, 1902.	Ker & Co	4, 300. 00
22826. Mar.	13, 1902.	Ker & Co	49, 000. 00
22846. Apr.	3, 1902.	Walter F. Stevenson et al	24, 084. 37
22860. May	3, 1902.	Warner, Barnes & Co	300, 000. 00
22879. May	19, 1902.	Jacob Hankrom	72, 568. 43
22901. June	21, 1902.	Pacific Oriental Trading Co	4, 280. 00
22902. June	21, 1902.	Pacific Oriental Trading Co	1, 587. 39
22903. June	21, 1902.	Pacific Oriental Trading Co	5, 632. 33
22904. June	21, 1902.	Pacific Oriental Trading Co	104, 374. 53
22905. June	21, 1902.	Pacific Oriental Trading Co	33, 148. 86
22907. June	25, 1902.	Robinson & Co	8, 000. 00
22908. June	25, 1902.	Compañía General de Tabacos	25, 984. 64
		Total	$3, 523, 618. 07

CLAIMS FILED ON AND SINCE JULY 1, 1902.

22913. July	1, 1902.	McLeod & Co	$360, 000. 00
22914. July	1, 1902.	C. Heinszln & Co	125, 000. 00
23117. Nov.	28, 1902.	Pacific Oriental Trading Co	125, 761. 18
24313. Oct.	30, 1903.	The American Commercial Co	3, 011. 37
24314. Oct.	30, 1903.	The American Commercial Co	267, 556. 21
24315. Oct.	30, 1903.	The American Commercial Co	3, 591. 52
24316. Oct.	30, 1902.	The American Commercial Co	550, 875. 34
			$1, 435, 795. 62

			Forward	$1,435,795.62
27736.	Apr.	11, 1905.	Stahl & Rumcker	6,500.00
27737.	Apr.	11, 1905.	Lenora T. Aylade Xobel	5,500.00
27738.	Apr.	11, 1905.	Fabricade Tabacos la Insular	400.00
27739.	Apr.	11, 1905.	Alfredo Chicote Beltran or Alfredo Chicote	5,500.00
27757.	Apr.	12, 1905.	The Standard Oil Co. of New York.	173,221.44
27772.	Apr.	17, 1905.	John M. Switzer	20,000.00
27773.	Apr.	17, 1905.	Calder & Co	4,000.00
27774.	Apr.	17, 1905.	Lambert & Presty	2,600.00
27775.	Apr.	17, 1905.	Manila Navigation Co	3,100.00
27776.	Apr.	17, 1905.	Philippine Lumber and Development Co	1,400.00
27777.	Apr.	17, 1905.	J. Parsons	3,000.00
27778.	Apr.	17, 1905.	Teodore de los Reyes	1,900.00
27779.	Apr.	17, 1905.	Successors of R. Bren	375.00
25425.	June	15, 1904.	Cosme Blanco Herrera et al	35,000.00
26013.	Aug.	18, 1904.	Kuenzle & Strieff	140,000.00
26014.	Aug.	18, 1904.	Kuenzle & Strieff	175,000.00
26015.	Aug.	18, 1904.	Holliday, Wise & Co	117,000.00
27176.	Dec.	22, 1904.	Edward A. Keller Sturche	79,790.89
27177.	Dec.	22, 1904.	Edward A. Keller Sturche	2,226.27
27306.	Jan.	16, 1905.	American Sugar Refining Company	113,946.90
27379.	Feb.	4, 1905.	Use of Carmon & Co	6,000.00
27381.	Feb.	4, 1905.	Augustine Medel	31,425.00
27591.	Apr.	1, 1905.	Campanía General de Tabacos de Filipinas	25,936.55
27592.	Apr.	1, 1905.	E. C. McCullough & Co	72,950.00
27593.	Apr.	1, 1905.	Ynchansti Companie	9,740.00
27594.	Apr.	1, 1905.	American Hardware and Plumbing Co	14,610.00
27595.	Apr.	1, 1905.	Newhall & Fenner	5,357.00
27596.	Apr.	1, 1905.	Findlay & Co	19,967.00
27597.	Apr.	1, 1905.	Macondray & Co	40,395.00
27598.	Apr.	1, 1905.	Sackerman & Co	73,050.00
27599.	Apr.	1, 1905.	Lutz Moll & Co	100,000.00
27600.	Apr.	1, 1905.	Behm, Myer & Co	200,000.00
27607.	Apr.	1, 1905.	Companie General de Tabacos de Filipinas	217,628.16
27608.	Apr.	1, 1905.	Sprungli & Co	3,477.86
27610.	Apr.	1, 1905.	Luchsinger & Co	5,000.00
27711.	Apr.	10, 1905.	Rita Donaldson Sim Valdez	30,000.00
27712.	Apr.	10, 1905.	Manuel T. Figueras	20,500.00
27713.	Apr.	10, 1905.	Compania Maritima	5,750.00
27727.	Apr.	10, 1905.	Conrad Struckmann et al.[a]	8,442.83
				$3,215,585.52

[a] Total of this claim is $184,723.77 Mexican currency; $176,280.94 is for duties on imports from Spain.

			Forward	$3,215,585.52
27728.	Apr.	11, 1905.	Hoskyn & Co	4,700.00
27729.	Apr.	11, 1905.	Union Farmacentica Filipinas	2,100.00
27730.	Apr.	11, 1905.	Cesar Garcia, administrator of one Gomez	150,000.00
27731.	Apr.	11, 1905.	Manuel Earnshaw & Co	3,900.00
27732.	Apr.	11, 1905.	Juan Tuason, liquidator of G. Hollman & Co	40,000.00
27733.	Apr.	11, 1905.	Meerkamp & Co	900.00
27734.	Apr.	11, 1905.	Reyes & Smith	25,000.00
27735.	Apr.	11, 1905.	Kuenzle & Streiff	3,400.00
27780.	Apr.	17, 1905.	Forbes, Munn & Co	50,000.00
27781.	Apr.	17, 1905.	Felix Ullmann	5,000.00
27782.	Apr.	17, 1905.	E. J. Smith	25,000.00
27783.	Apr.	17, 1905.	D. H. Gulick	2,500.00
27650.	Apr.	10, 1905.	Levy Brothers	5,000.00
27651.	Apr.	10, 1905.	Henry D. Wolf	5,500.00
27652.	Apr.	10, 1905.	Erlanger & Galinger	20,000.00
27653.	Apr.	10, 1905.	Heacock & Freer	5,000.00
27654.	Apr.	10, 1905.	Carlos Gsell	4,600.00
27655.	Apr.	10, 1905.	L. J. Lambert	3,000.00
27656.	Apr.	10, 1905.	Daniel Denniston	2,000.00
27657.	Apr.	10, 1905.	The B. W. Cadwallader Co	7,000.00
27658.	Apr.	10, 1905.	John Gibson	3,500.00
27659.	Apr.	10, 1905.	El Verdadero de Manila	10,000.00
27660.	Apr.	10, 1905.	The Singer Manufacturing Co	8,500.00
27661.	Apr.	10, 1905.	Mariano y Chaco	5,000.00
27662.	Apr.	10, 1905.	M. A. Clarke	15,000.00
27663.	Apr.	10, 1905.	Greilsammer Bros	1,200.00
27664.	Apr.	10, 1905.	Camille Alkan	7,500.00
27665.	Apr.	10, 1905.	Francisco Reyes	7,000.00
27666.	Apr.	10, 1905.	Froloch & Kuttner	12,000.00
27667.	Apr.	10, 1905.	J. F. Ramirez	4,100.00
27668.	Apr.	10, 1905.	Rafael Reyes	15,000.00
27669.	Apr.	10, 1905.	San Miguel Brewery	4,600.00
27670.	Apr.	10, 1905.	J. M. Tuason & Co	8,000.00
27671.	Apr.	10, 1905.	Alfredo Roensch	8,000.00
27672.	Apr.	10, 1905.	N. T. Hashim & Co	30,000.00
27673.	Apr.	10, 1905.	Pons & Co	100.00
27674.	Apr.	10, 1905.	Santos and Jaehrling	2,200.00
27675.	Apr.	10, 1905.	Blanc and Brunschwig	1,400.00
27676.	Apr.	10, 1905.	Paul Hube	2,400.00
27677.	Apr.	10, 1905.	Serre & Co	600.00
27678.	Apr.	10, 1905.	Vinda de M. Soler	1,900.00
27679.	Apr.	10, 1905.	A. G. Librant, Siegert	1,400.00
27680.	Apr.	10, 1905.	Ramon Moutes	2,100.00
27681.	Apr.	10, 1905.	Lutz & Co	1,600.00
				$3,733,285.52

			Forward	$3,733,285.52
27682.	Apr.	10, 1905.	Rita Donaldson Sim Valdez	10,000.00
27683.	Apr.	10, 1905.	La Compania Elextricista	8,200.00
27801.	Apr.	19, 1905.	W. F. Stevenson & Co	194,163.89
27820.	Apr.	24, 1905.	Angel Ortigm	30,480.00
27830.	Apr.	26, 1905.	Rueda Hermanos	1,417.00
27831.	Apr.	26, 1905.	Hubert y Guamis	1,800.00
27832.	Apr.	26, 1905.	Vinda de E. Bota	600.00
27833.	Apr.	26, 1905.	Cortijo & Co	650.00
27834.	Apr.	26, 1905.	Perez Hermanos	350.00
27835.	Apr.	26, 1905.	Luciano Cordoba	1,600.00
				$3,982,546.41

In the following cases preliminary petitions have been filed alleging indebtedness generally:

27848.	May	3, 1905.	David Sampson	$100,000.00
27849.	May	3, 1905.	Zeetvion	15,000.00
27850.	May	3, 1905.	H. Price	8,000.00
27851.	May	3, 1905.	James Norton	5,000.00
27852.	May	3, 1905.	Mariana Velasco	4,000.00
27853.	May	3, 1905.	Weingarten Brothers	3,000.00
27854.	May	3, 1905.	Tanjoco Company	3,000.00
27855.	May	3, 1905.	Woodward Company	3,000.00
27856.	May	3, 1905.	Luttrell Darley	2,000.00
27857.	May	3, 1905.	Phil Seldner	1,000.00
				$144,000.00

RECAPITULATION.

Total claims filed up to July 1, 1902	$3,523,618.07
Total claims filed on and since July 1, 1902	3,982,546.41
Petitions alleging indebtedness generally	144,000.00
Grand total	$7,650,164.48

WILLIAM H. MOODY,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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FILE COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN ET AL., plaintiffs in error, v. THE UNITED STATES.	No. 149.
WARNER, BARNES & CO. (LIMITED), appellant, v. THE UNITED STATES.	No. 466.

ON PETITION FOR REHEARING.

CORRECTION AS TO STATEMENT OF CLAIMS FILED.

We inform the court that our statement of claims filed is erroneous in that we assumed the amounts to be in American currency, whereas many are in Mexican dollars. Furthermore, the list submitted to the court contained some claims of export duties and other items not involving the import tariff at all or imports from foreign countries. The list has now been carefully revised and corrected, and is appended hereto in accurate form. Claims on imports from *Spain* have been retained because of the provision of the treaty (Art. IV) that "the United States will, for the term of ten years from the date of the exchange of the ratifications of the present

treaty, admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States."

The information originally given us led us to think that either the claims expressed American currency on their face, or that they had been reduced to that currency before the list was transmitted to us. We have just discovered these mistakes (which were inadvertent), and hasten to apprise the court that the amount of refunds due under the decision will not be $7,650,164.48, as stated, but somewhat less than half that amount, viz, $3,485,328.74.

This total does not include the particular claim of Warner, Barnes & Co. before the court, amounting to $81,126.65, nor the Lincoln claim amounting to $713.42; and it is proper to add that the number and amount of claims, like the Lincoln claim, pending in other Federal courts than the Court of Claims, is at present unknown.

It is unnecessary to say that we had no intention or desire to exaggerate the consequences of the decision, and it is manifest that, allowing for the error made, the sum of money at stake is large enough to justify fully our previous references to the money importance of the issue.

WILLIAM H. MOODY,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

CLAIMS FILED UP TO JULY 1, 1902.

22761.	Jan. 25, 1902.	Smith, Bell & Co	$2,000.00
22808.	Feb. 27, 1902.	Guiterrez Hermanos	69,469.98
22809.	Feb. 27, 1902.	Juan B. Gomez	9,876.88
22810.	Feb. 27, 1902.	Juan B. Gomez	1,563.55
22812.	Mar. 3, 1902.	Warner, Barnes & Co	700.00
22816.	Mar. 5, 1902.	Perez & Co	700.00
22817.	Mar. 5, 1902.	Perez & Co	8,000.00
22823.	Mar. 13, 1902.	Ker & Co	90,000.00
22825.	Mar. 13, 1902.	Ker & Co	2,150.00
22879.	May 19, 1902.	Jacob H. Ankrom	72,568.43
22904.	June 21, 1902.	Pacific Oriental Trading Co	104,374.53
22905.	June 21, 1902.	Pacific Oriental Trading Co	33,148.86
22907.	June 25, 1902.	Robinson & Co	60,000.00
	Total		$454,552.23

CLAIMS FILED ON AND SINCE JULY 1, 1902.

22914.	July 1, 1902.	C. Heinszen & Co	$125,000.00
23117.	Nov. 28, 1902.	Pacific Oriental Trading Co	125,761.18
24313.	Oct. 30, 1903.	The American Commercial Co	3,011.37
24314.	Oct. 30, 1903.	The American Commercial Co	267,556.21
24315.	Oct. 30, 1903.	The American Commercial Co	3,591.52
24316.	Oct. 30, 1902.	The American Commercial Co	550,875.34
27736.	Apr. 11, 1905.	Stahl & Rumcker	6,500.00
27737.	Apr. 11, 1905.	Lenora T. Aylade Zobel	5,500.00
27738.	Apr. 11, 1905.	Fabricade Tabacos La Insular	400.00
27739.	Apr. 11, 1905.	Alfredo Chicote Beltran or Alfredo Chicote	5,500.00
27757.	Apr. 12, 1905.	The Standard Oil Co., of New York	173,221.44
27772.	Apr. 17, 1905.	John M. Switzer	20,000.00
27773.	Apr. 17, 1905.	Calder & Co	4,000.00
27774.	Apr. 17, 1905.	Lambert & Presty	2,600.00
27775.	Apr. 17, 1905.	Manila Navigation Co	3,100.00
27776.	Apr. 17, 1905.	Philippine Lumber and Development Co	1,400.00
27777.	Apr. 17, 1905.	John Parsons	3,000.00
27778.	Apr. 17, 1905.	Teodore de los Reyes	1,900.00
27779.	Apr. 17, 1905.	Successors of R. Bren	375.00
26013.	Aug. 18, 1904.	Kuenzle & Strieff	140,000.00
26014.	Aug. 18, 1904.	Kuenzle & Strieff	175,000.00
26015.	Aug. 18, 1904.	Holliday, Wise & Co	117,000.00
27176.	Dec. 22, 1904.	Edward A. Keller Sturche	79,790.89
27177.	Dec. 22, 1904.	Edward A. Keller Sturche	2,226.27
27591.	Apr. 1, 1905.	Compania General de Tabacos de Filipinas	25,936.55
27592.	Apr. 1, 1905.	E. C. McCullough & Co	72,050.00
27593.	Apr. 1, 1905.	Ynchansti Companie	9,740.00
			$1,925,035.77

			Forward	$1,925,035.77
27594.	Apr.	1, 1905.	American Hardware & Plumbing Co	14,610.00
27595.	Apr.	1, 1905.	Newhall & Fenner	5,357.00
27596.	Apr.	1, 1905.	Findlay & Co	19,967.00
27597.	Apr.	1, 1905.	Macondray & Co	40,395.00
27598.	Apr.	1, 1905.	Sackerman & Co	36,525.00
27599.	Apr.	1, 1905.	Lutz, Moll & Co	50,000.00
27600.	Apr.	1, 1905.	Behm, Myer & Co	100,000.00
27608.	Apr.	1, 1905.	Sprungli & Co	3,477.86
27712.	Apr.	10, 1905.	Manuel T. Figueras	20,500.00
27713.	Apr.	10, 1905.	Compania Maritima	5,750.00
27727.	Apr.	10, 1905.	Conrad Struckmann et al	92,361.88
27728.	Apr.	11, 1905.	Hoskyn & Co	4,700.00
27729.	Apr.	11, 1905.	Union Farmacentica Filipinas	2,100.00
27730.	Apr.	11, 1905.	Cesar Garcia, administrator of one Gomez	150,000.00
27731.	Apr.	11, 1905.	Manuel Earnshaw & Co	3,900.00
27732.	Apr.	11, 1905.	Juan Tuason, liquidator of G. Hollman & Co	40,000.00
27733.	Apr.	11, 1905.	Meerkamp & Co	900.00
27734.	Apr.	11, 1905.	Reyes & Smith	25,000.00
27735.	Apr.	11, 1905.	Kuenzle & Strieff	3,400.00
27780.	Apr.	17, 1905.	Forbes, Munn & Co	50,000.00
27781.	Apr.	17, 1905.	Felix Ullmann	5,000.00
27782.	Apr.	17, 1905.	E. J. Smith	25,000.00
27783.	Apr.	17, 1905.	D. H. Gulick	2,500.00
27650.	Apr.	10, 1905.	Levy Brothers	5,000.00
27651.	Apr.	10, 1905.	Henry D. Wolf	5,500.00
27652.	Apr.	10, 1905.	Erlanger & Galinger	20,000.00
27653.	Apr.	10, 1905.	Heacock & Freer	5,000.00
27654.	Apr.	10, 1905.	Carlos Gsell	4,600.00
27655.	Apr.	10, 1905.	L. J. Lambert	3,000.00
27656.	Apr.	10, 1905.	Daniel Denniston	2,000.00
27657.	Apr.	10, 1905.	The B. W. Cadwalader Co	7,000.00
27658.	Apr.	10, 1905.	John Gibson	3,500.00
27659.	Apr.	10, 1905.	El Verdadero de Manila	10,000.00
27660.	Apr.	10, 1905.	The Singer Manufacturing Co	8,500.00
27661.	Apr.	10, 1905.	Mariano y Chaco	5,000.00
27662.	Apr.	10, 1905.	M. A. Clarke	15,000.00
27663.	Apr.	10, 1905.	Greilsammer Bros	1,200.00
27664.	Apr.	10, 1905.	Camille Alkam	7,500.00
27665.	Apr.	10, 1905.	Francisco Reyes	7,000.00
27666.	Apr.	10, 1905.	Froloch & Kuttner	12,000.00
27667.	Apr.	10, 1905.	J. F. Ramirez	4,100.00
27668.	Apr.	10, 1905.	Rafael Reyes	15,000.00
27669.	Apr.	10, 1905.	San Miguel Brewery	4,600.00
				$2,771,979.51

		Forward	$2,771,979.51
27670.	Apr. 10, 1905.	J. M. Tuason & Co	8,000.00
27671.	Apr. 10, 1905.	Alfredo Roensch	8,000.00
27672.	Apr. 10, 1905.	N. T. Hashim & Co	30,000.00
27673.	Apr. 10, 1905.	Pons & Co	100.00
27674.	Apr. 10, 1905.	Santos & Jaehrling	2,200.00
27675.	Apr. 10, 1905.	Blanc & Brunschwig	1,400.00
27676.	Apr. 10, 1905.	Paul Hube	2,400.00
27677.	Apr. 10, 1905.	Serre & Co	600.00
27678.	Apr. 10, 1905.	Viuda de M. Soler	1,900.00
27679.	Apr. 10, 1905.	A. G. Librant, Siegert	1,400.00
27680.	Apr. 10, 1905.	Ramon Montes	2,100.00
27681.	Apr. 10, 1905.	Lutz & Co	1,600.00
27682.	Apr. 10, 1905.	Rita Donaldson Sim Valdez	10,000.00
27683.	Apr. 10, 1905.	La Compañía Electricista	8,200.00
27820.	Apr. 24, 1905.	Angel Ortigm	30,480.00
27830.	Apr. 26, 1905.	Rueda Hermanos	1,417.00
27831.	Apr. 26, 1905.	Hubert y Gu nis	1,800.00
27832.	Apr. 26, 1905.	Vinda de E. Bota	600.00
27833.	Apr. 26, 1905.	Cortijo & Co	650.00
27834.	Apr. 26, 1905.	Perez Hermanos	350.00
27835,	Apr. 26, 1905.	Luciano Cordoba	1,660.00
			$2,886,776.51

In the following cases preliminary petitions have been filed, alleging indebtedness generally:

27848.	May 3, 1905.	David Sampson	$100,000.00
27849.	May 3, 1905.	Zeetvion	15,000.00
27850.	May 3, 1905.	H. Price	8,000.00
27851.	May 3, 1905.	James Norton	5,000.00
27852.	May 3, 1905.	Mariano Velasco	4,000.00
27853.	May 3, 1905.	Weingarten Bros	3,000.00
27854.	May 3, 1905.	Tanjoco Co	3,000.00
27855.	May 3, 1905.	Woodward Co	3,000.00
27856.	May 3, 1905.	Luttrell Darley	2,000.00
27857.	May 3, 1905.	Phil Seldner	1,000.00
			$144,000.00

RECAPITULATION.

Total claims filed up to July 1, 1902	$454,552.23
Total claims filed on and since July 1, 1902	2,886,776.51
Petitions alleging indebtedness generally	144,000.00
Grand total	$3,485,328.74

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, John R. Bradlee, and Charles D. Barry, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO., LIMITED, appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FILED UNDER ORDER OF COURT UPON PETITION FOR REHEARING.

This brief, under the order of the court, is to be—

> Addressed solely to the two points, whether Congress ratified the collection of the sums sought to be recovered in these suits, and whether it had power to do so.

7655—05——1

This leaves in the case for present discussion only the questions of the *intention* of Congress and the *power* of Congress.

But before taking up these two points it is permissible to recapitulate the preliminary point of the *intention* of the *Executive*, in order that we may get in close touch with the subject and introduce the discussion logically.

I. THE INTENTION OF THE EXECUTIVE.

We have heretofore shown, we think, in the former briefs, that beyond doubt the Executive, understanding and believing that it had the power so to do, intended to continue and did continue by various orders and in actual administrative practice the provisional tariff after April 11, 1899, just as before. When authority and administration on the civil side were gradually transferred from military officers to the civil administration under the Letter of Instructions to the Philippine Commission of April 7, 1900, and the order appointing the president of the Commission as civil governor, there was no disturbance or change whatever in the theory of that tariff, in the Executive views of the foundation on which it rested, or in its imposition and enforcement. Manifestly, the entire scheme, so far as intention of the Executive and operation under the Executive are concerned, was a continuous, unitary, and unbroken thing from the date of the original order in July, 1898, to the final legislation by Congress in 1902. (Petition of the United States for rehearing, pp. 4–10; brief of the Attorney-Gen-

eral on petition for rehearing, pp. 2–10.) We emphasize two facts (as to the continuous intention and action of the Executive) brought out we think, in the passages last cited, viz, long after the treaty of peace was ratified by both powers, and one day before ratifications were exchanged and the treaty proclaimed; that is to say, on April 10, 1899, the President acted on the tariff, in the series of minor revisions, by incorporating an additional paragraph. Can it be supposed that the President would so act if he thought or intended that what he did would become nugatory at once? The answer to that question can only be in the negative; and it is to be added that less than a month after ratification (May 3, 1899) a further order was promulgated, which is meaningless unless construed as another logical step in the uninterrupted development of the original order of July 12, 1898. Again, the Secretary of War's telegram to the chairman of the Commission at Manila, dated June 8, 1901, shows plainly that at that stage the President was continuing to impose duties as theretofore; that further revision in details was being formally considered, and that legislation adopting the military tariff without modification in principle, proposed by the Commission (and enacted by them September 17, 1901), was authorized.

II. THE INTENTION OF CONGRESS.

Coming now to the first of the remaining points—the inaction of Congress at the outset, that is, its failure to declare and enact specifically as soon as the treaty was

ratified, must be taken, we think, to mean that Congress also supposed that the war power of the President was ample and extended to the new armed conflict. The legislature not disapproving, its silence signified assent and acquiescence. Of course, apart from formal recorded proceedings, committee action, the taking of testimony, etc., it must be conclusively presumed that Congress was fully informed at all stages and knew exactly what was taking place and being done both in the military campaigns and in civil administration. The formal and concrete action of Congress during the insurrectionary period up to the enactment of the Spooner amendment was logically confined to providing men and munitions. This was necessary for Congress to do, and this is all that was necessary for it to do consistently with the idea of its tacit assumption of the extent of the Excutive power and its tacit agreement in the propriety of the Executive acts. Plainly no unfavorable inference can be drawn from this essential "legislation of the purse," as containing in the affirmative grant a sort of negative pregnant; that is, a prohibition on the President or any dissent whatever from the civil and military programme of his Administration.

Then came the Spooner amendment in March, 1901, and whatever else may be pertinent to say about it, this much is certain—that it followed by substantial reproduction of language the precedent of the Louisiana case (act of October 31, 1803; 2 Stat., 245); that there could not well be a broader grant of power giving the President all possible authority to cover every

phase of the Philippine emergencies and necessities, and that the *general intention* of Congress at that point to approve comprehensively what the President had previously done, and to authorize him comprehensively to act thus in future, appears too plainly for any discussion.

The act of March 8, 1902, was the adoption by Congress itself, as its own tariff law for the Philippines, of the existing provisional tariff, without any change, and specifying that it applied to merchandise entering the Philippines from the United States. This statute altogether disposed for the future of the question of the validity of the taxation, and of course falls completely within the ruling of the insular cases respecting the constitutionality of the analogous law for Porto Rico—the Foraker Act. No reasonable mind could doubt that the fair and natural inference from this act is that Congress had followed the proceedings in the tariff field respecting the Philippines and approved what had been done, although so far without specific ratification as to the past. In other words, this act throws light on the real intendment of Congress in the ratifying act of the following July.

It is certainly difficult to a plain apprehension approaching the confirming act of July 1, 1902, and reading the language in the light of the previous facts which we have briefly set forth, to conceive that Congress did not mean to foreclose this subject when it approved, ratified, and confirmed the action of the President as set forth in his order of July 12, 1898,

together with the subsequent amendments of said order, and approved the action of the authorities of the government of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments. With deference, it seems like ignoring the plain meaning and searching for hidden significance and distinctions which were not at all in the mind of Congress and do not really exist, to say that the statute was meant to ratify the President's action only so far as taken by virtue of his *undoubted* authority as Commander in Chief, and approved only those proceedings and doings of his subordinate officers which were in *unquestioned* accordance with the provisions of the order; that is, as applicable only before April 11, 1899; because all those actions of the Executive (prior to April 11, 1899) were unquestionably valid without ratification by Congress under established principles of public law. Long before the act was passed this court said so when it decided in *Dooley* v. *United States* (182 U. S., 222) that the Executive action imposing duties upon goods imported into Porto Rico up to the date of ratification of the treaty of peace was entirely valid. The force and significance of the language used and the impossibility of restraining it to the time and the Executive action before April 11, 1899, unless the words of the statute are wrested from their obvious and natural import, are set forth in the brief of the Attorney-General on the petition for rehearing at pages 16–21, and it is not necessary for us to repeat now the contentions there pre-

sented, which, indeed, seem to be so plain and so logically necessary as to forbid question. Whatever the correct conclusion may be on the question of power, we submit that there can be no doubt whatever about the *intention* of Congress in the ratifying act. On this branch of the case we quote again the text of sections 1 and 2 of the act of July 1, 1902, with assured confidence that the language alone, reasonably construed in the light of all the circumstances, constitutes an unanswerable argument:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands, as set forth in the act of the Philippine Commission, entitled "An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth,

nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

Future appointments of civil governor, vice-governor, members of said Commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

SEC. 2. That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands, upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the action of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved: *Provided*, That nothing contained in this section shall be held to amend

or repeal an act entitled "An act temporarily to provide revenue for the Philippine Islands, and for other purposes," approved March eighth, nineteen hundred and two.

III. THE POWER OF CONGRESS.

Immediately after the case of the *Diamond Rings* was decided in December, 1901, Congress took up actively the investigation of Philippine conditions, including the tariff. The legitimate view of the failure to act earlier, in contrast with the relatively prompt action on Porto Rico, is that the distinction between the cases because of the insurrectionary fighting, supposed to exist until that decision was announced, was regarded as giving the President ample power. Congress trusted the Executive to act providently and rightly in that novel and distant field, presenting difficulties and problems totally foreign to any previous national experience. The proceedings of the Executive were known and certainly not disapproved by Congress, but, unlike Porto Rico, for many obvious reasons, the situation was not, previous to December, 1901, in the judgment of Congress, ready for exact affirmative legislation. If this view also leaves an impression that there was some doubt and timidity in the mind of Congress, not entirely removed by the general vote of confidence and authority of the Spooner amendment, our reply is that, on the contrary, the response of Congress, as soon as the court's view was known on the correlative case (as it must now be viewed) of the *Diamond Rings*, showing that belief in the amplitude

of the war power was probably not well founded and requiring specific legislation, was a prompt and generous ratification of all the Executive acts. There might very naturally have been some previous doubt about this unknown oriental task; if there were also previous timidity, that was fully atoned for, but the Spooner amendment appears to repel all such suggestions, so far as relates to the conception then prevailing in Congress as to the power, good judgment, and sound discretion of the Executive.

At all events, Congress now took up, in December, 1901, the task in detail. Bills were presented defining the tariff relations of the Philippine Islands to the United States and the rest of the world, and in a comparatively short period the Philippine tariff act of March 8, 1902, *ante*, was enacted. During these intervening months and throughout the spring of 1902 the whole subject of the Philippines was carefully examined by Congress; there were protracted hearings before committees, evidence was taken, and all that was done under American occupancy, revenue needs, the existing tariffs, etc., were scrutinized and discussed. (Sen. Doc. No. 171, 57th Cong, 1st sess.; Hearings before Senate Committee on the Philippines, Sen. Doc. No. 331, 57th Cong., 1st sess., pp. 149–154; Hearings before House Committee on Insular Affairs, 57th Cong., p. 139; Attorney-General's Brief on Petition for Rehearing, pp. 11–13.) The result was the act of July 1, 1902.

[a] Printed for the use of the Committee and not published in the Congressional document series.

We have presented to the court the authorities on the effect of a subsequent ratification as equivalent to a prior mandate. (Brief for the United States, pp. 21–26; brief of the Attorney-General on petition for rehearing, pp. 21–23). They amount to this, that if the legislature could originally have conferred power, it can afterwards ratify with full effect and approve and justify the mistaken exercise of authority. This principle probably covers a plain usurpation of authority, the legislature, when no violation of constitutional guarantees or disturbance of vested rights appears, being the final judge of the necessity and propriety of the previous unauthorized act. Much more should the principle be applied where there can not be the slightest doubt of the high purpose and right intention of the Executive; where there was just doubt whether his power was not ample *ab origine*, explaining the delay of the legislature—a doubt not only existing prior to the *Diamond Rings* decision, but fairly persisting until the decision in the cases at bar, because there was until then persuasive reason for saying that the *Diamond Rings* case was not the exact correlative of these cases. And, further, much more should the principle be applied here, because, proceeding *bona fide* under authority believed to exist, the Executive was performing in the field of the highest national duty and international relations the work of blazing out a safe path in the depths of an unknown tropical forest, while all the world (it is not mere rhetoric to add) looked on and awaited the issue with suspended judgment.

Now, the decision in *Downes* v. *Bidwell* makes it certain that on April 11, 1899, Congress might constitutionally have enacted the law which was passed on March 8, 1902. Congress was not ready to take analogous action on the much less difficult problem presented in Porto Rico until April 12, 1900 (31 Stat., 77); and in that case Congress did not deem it necessary to ratify for the previous period intervening between the ratification of the treaty and the date when the Porto Rican act took effect. It is not rational to suppose or expect that Congress can be ready or ought to be ready *eo instante* upon ratification of a treaty, to provide a tariff for an insular possession, as it may constitutionally do.

What good reason can be given for not according to this ratifying legislation the usual effect of the rule? There is certainly no violation of constitutional guarantees in the way; there is no confiscation of vested rights, as we shall endeavor to show later.

We have already analyzed the doctrine of subsequent ratification as applied to this case, and discussed the subject fully, and need not repeat what we have already said. (Brief for the United States, pp. 26, 27; brief of the Attorney-General on petition for rehearing, pp. 21–23.) We stand on the proposition that Congress did by its enactments of March, 1901, and March and July, 1902 (the two former as preliminary and manifesting policy and intention, the latter as covering the past completely), accomplish as of the earlier date what it might have accomplished on

the earlier date. It acted *nunc pro tunc* within the rule, and ratified with the effect of a previous authority conferred.

But one of the briefs before the court on the original hearing (brief filed for certain claimants by Messrs. Herbert and Micou, pp. 22–25) insists that the ratification by Congress is without effect; that Congress could not have authorized in the first place, and therefore could not ratify afterwards; that authority originally conferred would have been an illegal delegation to the Executive of legislative power, and therefore that the entire substructure of the Government case must fall. The answer to all that line of argument is plain and brief; the case does not at all involve the notion of an attempted delegation of legislative power. Of course it is true that the legislature can not ratify what it can not authorize, and the power to do a thing or to authorize it to be done *nunc pro tunc* implies present right. But that does not affect our argument. There has never been a time since the declaration of war against Spain when Congress could not have authorized the President to do what was done here, although that would have been supererogation as to the period ending with the treaty ratification. We shall endeavor to state the point briefly and clearly: The President during the war emergencies directed his officers to act in a certain way, to collect duties under a provisional tariff. If his orders to that effect before the treaty took effect were, technically, legislation, that was valid legisla-

tion beyond question, and needed no authority or ratification from Congress. These orders fell, let us say, as valid legislation on April 11, 1899, but the President continued to do the thing prescribed without immediate authority. He did not legislate; he did not reestablish former legislation; he simply acted and continued to act. At that moment and ever since Congress could have stepped in, as it finally did, and legislated by enacting a Philippine tariff law. This the President would have enforced by continuing to do precisely what he had done before under his own orders and what he actually did in the absence of a statute and actually did under the statute when finally enacted. His orders, originally valid as war-power legislation, furnished the model and constituted, indeed, an identical forerunner of the ultimate law of Congress. But he was simply acting after April 11, 1899, not legislating. If Congress had legislated on April 11, 1899, the President would not have been authorized to legislate, but to act under the legislation of Congress, just as he was authorized to act and not to legislate in Porto Rico in May, 1900, by the Foraker act; the only difference being that the Foraker act covered the entire field of civil administration in Porto Rico, while the Philippine tariff act of March, 1902, dealt only with the tariff side of the Philippine case. Now if that authority to act had been the effect and the true aspect of the Philippine tariff law, supposing it to have become law on April 11, 1899 (as it was the effect and

function of the law when finally adopted), there is no conceivable reason why the complete ratification of July, 1902, does not relate back in the same way and validate from every point of view the intervening imposition and collection of duties. We have already presented this conception of the matter in somewhat different language (Brief for the United States, p. 27) and do not deem it necessary to reiterate the argument further.

To return for a few moments to the general doctrine—it is certain that the decisions in the *Mattingly* case (97 U. S., 687) and in *Hamilton* v. *Dillin* (21 Wall., 73, 96) distinctly rule that Congress has the power to validate the collection of taxes which were invalid by reason of a failure of Congress to act when collected, or to authorize the collection in advance. In *Anderson* v. *Santa Anna* (116 U. S., 356) and in *Bolles* v. *Brimfield* (120 U. S., 759) Mr. Justice Harlan for the court sustained the rule on ratification whenever the statute only confirms acts which the legislature might lawfully have authorized in the first instance. In the latter case he said:

> Could the legislature, by subsequent ratification, make that legal which was originally without legal sanction, but which it might, in the first instance, have authorized? A negative answer to this question would be in conflict with numerous decisions of this court upon the general question as to the power of a legislature to enact curative statutes when not restrained by constitutional provisions.

In *Bridgeport* v. *Housatonic R. R. Co.* (15 Conn., 475) the court say:

> Although individuals may not have power to make good *ab initio* that which was originally void, by subsequent deeds or acts of confirmation, yet this can not be true of acts of sovereignty—acts of legislation not conflicting with constitutional right. And in giving a construction to such an act, the only question can be, What was the intention of the legislature? When this is ascertained, our duty is imperative to give to that intention its legal effect. * * * The end of all confirmatory laws, so far as they are intended to be retroactive, is to set up and give original effect to acts before void or inoperative.

In *Wilkinson* v. *Leland* (2 Pet., 662) the court, by Mr. Justice Story, held that a retrospective act may give validity to a void transaction, if it does not divest the settled rights of property. "It can not be doubted that an act of Parliament may by terms of confirmation make valid a void thing if such is its intent." (Citing well-known ancient authorities.) Further cases on the maxim and rule respecting ratification, additional to those cited in our original brief, are—

State v. *Squires*, 26 Ia., 340;
Grogan v. *San Francisco*, 18 Cal., 590;
McCauley v. *Brooks*, 16 id., 1, 27;
McCracken v. *San Francisco*, id., 591;
Brady v. *Mayor, etc.*, 16 How. Pr., 432;
Zottman v. *San Francisco*, 20 Cal., 97;
Peterson v. *Mayor, etc.*, 17 N. Y., 449;

Schneck v. *City of Jeffersonville*, 152 Ind., 204; *Marks* v. *Purdue University*, 37 Ind., 155.

As to precedents and analogies in other legislation by Congress—the situation was different during the civil war, because on the one hand the war power was determined to be ample, and on the other hand Congress was in close touch and legislated as fast as emergencies or needs arose, although there was singularly little legislation considering the great occasion, the general conduct of the war being left to the Executive substantially without challenge or interference. However, section 3 of the act of August 6, 1861 (12 Stat., 326), provided that all the acts, proclamations, and orders of the President after March 4, 1861, respecting the Army, Navy, and volunteers, "are hereby approved and in all respects legalized and made valid to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States." It is on this statute that Justice Grier comments in the *Prize Cases* (2 Black, 635, 670, 671), sustaining the principle of law regarding subsequent ratification and holding that if it were necessary to invoke the principle in that case the statute has operated perfectly to cure any defect. He cites *Brown* v. *United States* (8 Cr., 131–133), and notes further that although Mr. Justice Story dissented from the majority of the court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority. A similar act, very sweeping in its terms, was passed

on March 2, 1867 (14 Stat., 432), ratifying all the acts and orders of the President respecting martial law, military trials, etc., as fully as if said orders and acts had been issued and done "under the previous express authority and direction of the Congress of the United States and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done." Express constitutional grants covered all such exercises of power, and yet since the life and liberty of individuals were affected, there might have been some tenderness and doubt whether the public safety required the action, to which considerations of abundance of caution and possibility of scruples are probably due the precise and detailed references in the ratifying act to previous express authority, placing the matter beyond peradventure as to the intent of Congress. But no one then seems to have entertained any doubt of its power to ratify, and in the present cases we submit that the intent is as clear, though not expressed with such anxious inclusion and iteration of language, as in the civil war acts.

We may note in passing that in *Hamilton* v. *Dillin* Mr. Evarts argued that the statute did not validate that which was illegal before; "no act can be construed to do this unless this be the plain purpose of the lawmaker." The court will observe how little there was in the law there involved which bore upon the right of the President to license traffic and impose a bonus—which really authorized what he did. There was only an implied recognition and ratification, and yet the

court found that sufficient to show the approval of Congress, if indeed it were necessary for Congress to approve at all.

As to other precedents, *Cross* v. *Harrison* (16 How., 164, 201) speaks of two acts of Congress which "adopted and ratified all the acts of the Government established in California upon the conquest of that Territory, relative to the collection of imposts and tonnage," but the opinion does not cite these acts and we are unable after careful search to identify any statutes of that period which justify this description as adopting and ratifying all the acts of the Territorial government respecting the collection of duties. Yet there stands the view of the court as to the right and power of the legislature to ratify after the event—and the same event as here.

In the Louisiana case the act of October 31, 1803 (2 Stat., 245), authorized the President to take possession of the Territory and exercise the powers of government temporarily. The Spooner amendment follows the language of that law almost *totidem verbis*. The subsequent statutes respecting Louisiana (November 25, 1803, 2 Stat., 248; February 24, 1804, id. 251; March 19, 1804, id. 272; March 26, 1804, id. 283) set up a territorial government and provided customs law almost as soon as possession was actually delivered; there were not really any Executive acts of doubtful or challenged authority in the short interval, and there was therefore no need of a ratifying and confirming act. This is the difference between the Louisiana and Phil-

ippine situations. The Florida case was substantially the same as that of Louisiana. There was no appreciable interval between possession and sufficient Congressional action.

In *The Grapeshot* (9 Wall., 129), the question of ratification arose in this way: "How far * * * the President could establish a provisional court, and how far Congress, on the suppression of the rebellion, could by its enactment validate the doings of such a court, transfer its judgments," etc. The Supreme Court held that the provisional court of Louisiana was properly established by the President in the exercise of his constitutional authority during the war. The act of Congress enacted July 28, 1866 (the official termination of the war in Louisiana was April 2, 1866, proclamation of President Johnson, 14 Stat., 811), provided that all suits in the provisional court proper for the jurisdiction of the Circuit Court of the United States should be transferred to that court and heard and determined therein, and that all judgments, orders, and decrees of the provisional court in causes transferred to the Circuit Court should at once become the judgments, etc., of that court. Upon this state of facts the opinion of the Supreme Court in the *Grapeshot* case also held that Congress had power on the close of the war and the dissolution of the provisional court to provide for the transfer of cases pending in that court and of its judgments and decrees to the proper courts of the United States. Since the war power was exhausted in Louisiana on April 2, 1866, the act of Congress was in

effect a ratification of unauthorized executive action for the period from April 2 to July 28, when the statute was enacted.

So that, so far as there are precedents in our history, they sustain the view that Congress clearly possesses the power under such circumstances to ratify Executive measures taken without previous authority. It is plain that constitutional guarantees are not violated; it is equally plain, we think, in this case, that there is no interference with valid vested rights of property.

IV. THE NOTION OF VESTED RIGHTS AND THE MATTER OF PROTEST.

These points of a vested right and of protest affect each other and affect and are affected by the power of Congress to ratify executive acts. We are not therefore carrying the discussion outside the limits laid down by the court in dealing with them. We have already touched upon the claim of vested rights (Additional brief for appellee, p. 2; brief of Attorney-General on petition for rehearing, pp. 21–23). All that can be said on behalf of this claim in the light of the views expressed in *De Lima* v. *Bidwell* is that the presumption in respect to ambiguous legislation claimed to affect previously existing rights is ordinarily against a retroactive effect; but such presumption does not obtain in case of an express ratification like this, intended on its face to be retroactive. When or why did these mere claims for tax refunds (surely not very just or equitable when all the facts are regarded) become a fixed and sacred right? The idea of the vest-

ing of a property or personal right involves great constitutional principles, and runs to those legal foundations which are sacred. Counsel for the claimants here simply assert that upon filing their petition they acquired a vested right to recovery which could not be taken away by subsequent legislation, relying on the expressions of *De Lima* v. *Bidwell* regarding legislation very different from this. (Brief for plaintiff in error and appellant, pp. 26, 27.) Counsel for certain other claimants support the argument on this branch of the case, viz, that Congress was without power to ratify the collection of these duties because rights had vested, by the suggestion that otherwise the fifth amendment to the Constitution is violated in that private property would be taken for public use without due process of law and without just compensation. (Brief of Messrs. Herbert and Micou, pp. 25 et seq.) Those clauses of the Constitution have been haled into many strange causes, but never into one more remote from their real meaning and application. It is idle to discuss that aspect; there is no sacred guarantee which has vested these claims.

Now let us look at them as they really are: The claimants were very willing to pay the duties in order to trade; they were fully aware of the exaction and were under no compulsion; they shifted the burden placed on them to their customers by adding the duties to the price for their merchandise; and now they are very willing to recover this amount again from the

Government. Does the simple putting of the claim in suit have the effect alleged? We can not think so. There is no essential reason in law or logic why the claimant who puts in his claim at any time within the general limitation of actions, but after the ratifying statute, should be worse off than he who by accident, most likely, has hit upon a time prior to the ratifying statute. The law only requires a uniform and moderate degree of diligence, "*infra sex annos*" (act of March 3, 1887, 24 Stat., 505), and does not give graduated premiums for different degrees of speed; and the ratifying statute, having a quite contrary intention, should not be construed as establishing a new rule of limitation by which those who had not already happened to act on July 1, 1902, or who were not aware that the law was about to be enacted and might have the effect now claimed, are cut off from remedy. This does not seem like equal rights or equality under the law; but our argument here goes to the absurdity of the idea of a vesting before the ratifying statute, and we say, nevertheless, that if the court should be convinced on all grounds that Congress did not ratify, this conclusion should be placed on the manifest ground of a lack of power (as to claims already filed and "vested") rather than a lack of intention; and then in that case the Government would stand, necessarily and as in duty bound, on the exclusion of those claimants who failed to bring suit before July 1, 1902. (See p. 23, brief of Attorney-General on petition for rehearing.)

Now what is the bearing of protest on this question of a vested right? Simply that the claims never were secure and valid; that the right never vested at all and filing a suit could not cure earlier defects; that the payments were voluntary and can not be recovered back; that there was no protest against the exaction at the time, in any sense, and that the necessary result of lack of proper protest is to deny the claim, under many decisions of the court, including very recent cases. (*Elliott* v. *Swartwout*, 10 Pet., 137; *Bend* v. *Hoyt*, 13 Pet., 263; *Converse* v. *Burgess*, 18 How., 413; *Philadelphia* v. *Collector*, 5 Wall., 720; *Nicholl* v. *United States*, 7 Wall., 122; *Wright* v. *Blakeslee*, 101 U. S., 174; *Barney* v. *Rickard*, 157 U. S., 352; *Chesebrough* v. *United States*, 192 U. S., 253.)

We can see no essential difference between the "cotton bonus" of *Hamilton* v. *Dillin*, which was manifestly a tax, and the tariff duties in the present cases. There is no difference whatever in principle. That was an exaction imposed under Executive order without any clear previous authority from Congress, for it is evident from the terms of the law and the language of the court that the authority was matter of implication, and, in in short, was not distinctly and certainly given. There was a subsequent ratifying act in general terms, which we have pointed out, but the court justified the exaction mainly on other grounds, viz, the competence of the war power.

It is evident that in *Hamilton* v. *Dillin* there was no protest. Mr. Evarts's argument was that no formal

protest was necessary to enable the plaintiff to recover, because there is no statute providing for protest in such a case; the exaction was wholly foreign to the purpose of the act or any act of Congress, so that there could be no provision for protest; nor was the payment a voluntary payment; the rules, the refusal to grant permits, the presence of the army to aid in the seizure of the cotton, the necessity of shipment to loyal States, great loss, etc., show it was a forced payment. This was the course of his argument. The court say:

> The Government chose to impose this condition. It supposed it had a right to do so. No one was bound to accept it. No one was compelled to engage in the trade. Not the least compulsion was exercised. The plaintiffs endeavor to put the case as if they were obliged to pay this exaction to save their property. This is not a true view of it. It is admitted that the property was purchased under the license. If so, it was also purchased in view of the regulations to which the license referred. The regulations themselves show that the permit to purchase and the permit to export were correlative to each other; that no one was permitted to purchase who did not enter into bond to pay all fees required by the regulations, amongst which the charge of 4 cents per pound on cotton was expressly inserted. In short, the permit to purchase and export constituted substantially one permit, and that was granted only on the condition of paying the prescribed fees, as before stated. The clearance of particular lots or cargoes required afterwards, when the property

was actually shipped, was necessary to show that the stipulated conditions had been complied with, and that the particular articles specified were free for transportation. The whole series of acts constituted, so far as the right to trade and transport was concerned, but one transaction—a conditional permission given on the part of the Government and the acceptance of and compliance with that condition on the part of the trader.

The position in which the plaintiffs put themselves, therefore, was an entirely voluntary one. They have no right now to say: "It is true we purchased the cotton under a license which required us to pay a certain bonus; but, having purchased it, we were entitled to repudiate the condition, although we had no right to make the purchase except by virtue of the license." Much less have they now a right to say, after having complied with the condition without murmur or objection, that the bonus was extorted from them by compulsion.

Whether, therefore, the President and Secretary of the Treasury did or did not rightly judge as to their powers under the act, the plaintiffs evidently agreed with them and voluntarily applied for permission to engage in the trade on the conditions imposed, and voluntarily paid the bonus which is now sought to be recovered back. The case does not come within the class of cases on which the plaintiffs rely to take it out of the rule as to voluntary payments. In our judgment, therefore, the defense in this case might have rested on this ground alone. (21 Wall., 91, 92.)

The present cases are at least as strong on the point of claimants' freedom from compulsion and as to their control over their property; they could simply decline to trade and seek another market. Their eyes were wide open to the facts before their cargoes sailed. There does not appear to have been any protest whatever in the pending cases, not even an informal one, much less the formal and technical protest usual in customs transactions, although we do not contend, and do not need to contend, that the latter was necessary, or, indeed, available, under the law applicable to the Philippines.[a]

The petition in the *Lincoln* case says that the military officer acting as collector assessed duties and they were paid by petitioners' agents, "but under duress and by compulsion in order to enable your petitioners' business to be carried on." It is apparent from the face of the petition that the petitioners had no notion that the duties were illegally exacted until they were "advised by counsel" that "the imposition and collec-

[a] Even before our own original law of February 26, 1845 (5 Stat., 727), prescribing a formal written protest, was adopted, some notice at least was always necessary to sustain a claim for refund (*Elliott* v. *Swartwout*, 10 Pet., 137; *Bend* v. *Hoyt*, 13 Pet., 263), even if merely verbal (*Swartwout* v. *Gihon*, 3 How., 110). In the Philippines from the beginning of our government, although a definite form was not then necessary, "objections to the assessment of duty" must be made before payment, failing which no refund was made (par. 10, Provisional Tariff and Regulations, G. O. No. 10, Military Governor of the Philippines, Oct. 26, 1898); and on February 6, 1902, the Philippine Commission enacted a customs administrative act, modeled closely after our own, and, specifically, as to the protest prescribed (1 Laws Phil. Com., 788, 853, sec. 286). As to the previous Spanish law on which the provisional tariff was declared to be based, there were specific provisions relating to protests, which were to be made within stated periods of time varying according to the ground of objection. (Berriz, Diccionario de la Administracion de Filipinas, 1891, p. 21.)

tion of said duties * * * were in violation of the rights and privileges secured to your petitioners under and by virtue of the provisions of the Constitution and laws of the United States and the said treaty of peace between the United States and Spain." The fact is the same in the *Warner-Barnes* case.

The position in *Cross* v. *Harrison* was manifestly identical. The court say that the importers knew there was an existing civil government instituted by authority of the President; that it had not ceased when their importations were made; that it was afterwards continued, and rightfully, until California became a State; "that they were not coerced to land their goods, however they may have been to pay duties upon them; that such duties were demanded by those who claimed the right to represent the United States, who did so, in fact, with most commendable integrity and intelligence; that the money collected has been faithfully accounted for," etc. (16 How., p. 201.)

I am entirely unable to see why this point is not to be resolved against the importers just as it was in *Hamilton* v. *Dillin* as to the internal-revenue cotton bonus, and as it was in *Cross* v. *Harrison* as to the war tariff imposed at San Francisco. In all these cases the importers were not bound to trade; they did not protest; their payments were voluntary, and as the court said in *Hamilton* v. *Dillin*, it is not legal or just for the plaintiffs to say, "It is true we purchased under a license which required us to pay the tax, but having purchased, we were entitled to repudiate the condi-

tion," etc. There the traders did not have the right to say, after having complied with the condition without murmur or objection, that the bonus was extorted from them by compulsion. Here the Philippine importers have no greater right.

It is true that the court has given claimants apparent reason to claim a vested right which the later ratifying legislation could not disturb, because in *De Lima* v. *Bidwell* it was held, adversely to the Government contention that the act of Congress of March 24, 1900, applying for local benefit the customs revenues received here on Porto Rican imports after the evacuation by the Spanish forces, was a recognition of the fact that Porto Rico continued to be a foreign country, etc., that this can clearly have no retroactive effect as to moneys theretofore paid *under protest* for which an action to recover back had already been brought.

> As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a subsequent act of Congress. Plaintiffs sue in assumsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action would be beyond its power. In any event it should not be interpreted so as to make it retroactive [citing authorities]. (182 U. S., 199–200.)

But the differences are manifest. To begin with, the act in the Porto Rican case was a mere direction

for the use of moneys in the treasury, and the retroactive effect claimed by the Government rested wholly on inference. Here the retroactive effect is a necessary and intended part of the law, manifest on its face. The authorities cited for the court's ruling on the point in the *De Lima* case are all State cases and can hardly overthrow the two cases in this court (*Hamilton* v. *Dillin; Cross* v. *Harrison*), in which the point was ruled against the motion of a vested right under circumstances precisely similar to the present case. Furthermore, in the *De Lima* decision the court say (referring still to the special act of March 24, 1900): "Perhaps we may go further and say that so far as these duties were paid voluntarily and without protest the legality of the payment was intended to be recognized." Here there was no protest, and therefore when the court says that the act of 1900 can clearly have no retroactive effect as to moneys theretofore paid under protest for which an action to recover back had already been brought, it is plainly meant that protest as well as suit was necessary to make the vested right; suit alone was not sufficient.

Finally, the case of *Chesebrough* v. *United States* (192 U. S., 253) is a very strong statement of the doctrine about voluntary payments and protests. "The rule is firmly established that taxes voluntarily paid can not be recovered back, and payments with knowledge and without compulsion are voluntary." Even when taxes are paid under protest or with notice that the payer contends that they are illegal and intends to

institute suit to compel their repayment, "a recovery in such a suit may on occasion be had, although, generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment."

That case related to internal-revenue stamp taxes, and decided that the purchase of stamps was purely voluntary and there could be no recovery without protest or notice, written or verbal, formal or informal; that protest or notice is clearly demanded for the protection of the Government and without it there would not be the slightest vestige of involuntary payment.

It is proper to say that this issue—the main question—can in no way affect the *credit* of the Executive. The course pursued was the only course which could have been pursued consistently with the executive duty—at first under the war power, then under the belief that the war power continued and that the decisions of the Supreme Court would justify its exercise (see cablegram of Secretary Root to Judge Taft, June 8, 1901; p. 8, Brief of the Attorney-General on Petition for Rehearing), and finally under the legislation of Congress of March and July, 1902. It was

the plain executive duty to collect and continue to collect these taxes (see *Cross* v. *Harrison*, *ubi supra*, p. 28 hereof); it was not for the Executive to anticipate or speculate upon a future adverse decision of the Supreme Court, which did not, in reality, settle the war-power feature until the recent decision herein. If the Executive had undertaken to construe the issue in advance and ceased to collect, say in June, 1901, and the court had sustained its exercise of power theretofore, error would have been committed and the Government prejudiced irreparably by the wrong judgment of the Executive. Valid taxes would have been lost forever; while, on the other hand, if the collection of duties continued, the claimants could bring the issue to judicial determination, as we now see.

It is evident that the present issue is entirely different from any of the previous insular cases. As the evolution herein has proceeded there is now no question of domestic or foreign territory, war power, constitutionality of an insular tariff act of Congress—the only questions are whether Congress has ratified, and, consequent on that question, whether claimants possess any vested rights or whether their payments were voluntary.

We respectfully ask the court to read in connection with this brief the passages in our earlier briefs to which we have referred herein. Those citations aid the logical development of our argument, and it does not

seem necessary to lengthen this brief by reprinting and incorporating here the passages in question.

On the whole case we respectfully and confidently submit—

That Congress intended by the act of July 1, 1902, to ratify the executive collection of tariff duties in the Philippine Islands after April 11, 1899;

That Congress possessed the power of such ratification unaffected by the claim of adverse vested right;

That the payments herein were voluntary, with full knowledge, without compulsion, and not under protest, formal or informal;

That for all these reasons there can be no recovery, and the judgments below should be affirmed.

WM. H. MOODY,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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Clerk.

Nos. 149 and 466.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. Bradlee, and Charles D. Barry, trading as copartners, under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,

v.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO. (LIMITED), APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL UPON REHEARING.

JANUARY 19, 1906.

In the Supreme Court of the United States.

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FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of HENRY W. PEABODY & CO., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO. (LIMITED), appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL UPON REHEARING.

MAY IT PLEASE YOUR HONORS: I shall confine my discussion of this case to the single question, whether the collection of the duties, before the court, which were collected upon goods coming from the United States into the Philippine Islands, by the order of the President, between the date of the exchange of the

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ratifications of the treaty of peace with Spain and the date of the imposition of the Philippine Commission tariff, has been ratified by Congress by the act of July 1, 1902. I shall leave to the Solicitor-General the further question in the case, the power of Congress, under the Constitution, to ratify the collection of such duties.

It is very evident that the question which I propose to discuss received very little consideration, at least in the argument on the part of the Government on the former hearing of this case, so little, I believe, that in the briefs the act which was relied on to effect the ratification was not even set forth by the Government, but merely referred to. So far as the question of ratification was touched at all, the discussion apparently dwelt upon the power of Congress to ratify the collection of these duties, and it appears to have been assumed, on the part of the Government at least, that Congress had intended by the enactment of the law of 1902 to ratify their collection, and that it accomplished that purpose if power existed in the Congress to accomplish it. This consideration is the justification alike for the petition for rehearing and for a more extended presentation of this part of the case than I otherwise should have felt justified in offering to your Honors. And I am confirmed in this view by the argument of counsel for plaintiffs just closed, from which it is apparent that the Government has not yet been able—due to our fault, doubtless—to cause our opponents to understand the position which we take in this

case. The main endeavor of the argument of the Solicitor-General on the former hearing was to draw a distinction on account of the widespread insurrection in the Philippine Islands between this case and the Dooley case, which dealt with importations into Porto Rico. He relied upon the flagrancy of the insurrection in those islands as a sufficient justification of the continued existence of the war power of the President after the exchange of the ratifications of the treaty of peace with Spain. That question in the case has been disposed of finally by that part of the decision of this court which holds that the situation was ruled by the case of the *Fourteen Diamond Rings* (183 U. S., 176), and I do not for a moment seek to reopen it. The opinion further decided that the ratification statute did not cover the disputed conduct of the Government officials, because their action was not taken in accordance with the order of July 12, 1898; and the two reasons why it seemed to the court that their action was not in accordance with this order were, first, because that order, by its terms, applied only during the continuance of the war with Spain, and, second, because—as I understand it, at least—by its terms it did not impose duties upon goods coming from the United States.

Mr. Justice HOLMES. If I may make a suggestion—I was, of course, responsible for the form of the words that were used, and, by reason of some misgivings that I had, stated it as narrowly as possible; but I did not mean to exclude the view, which certainly was very

much considered by the court, that the words of the statute, irrespective of the President's order, could not properly be interpreted as having that wide effect.

The ATTORNEY-GENERAL. On account of the power?

Mr. Justice HOLMES. On account of the meaning of the words.

The ATTORNEY-GENERAL. I will come to that; but I venture to say that the language of the opinion did not suggest that to my mind.

Mr. Justice HOLMES. I am responsible for that.

The ATTORNEY-GENERAL. It will be my respectful submission to the court that those two propositions proceed upon an incomplete view of the facts of the case; and, after consultation with the Solicitor-General, I think it is my duty to say to the court that the Government was responsible for that incomplete presentation of the facts, and responsible for the reason that I have attempted to set forth.

Your Honors, the duties in question were collected between the date of the exchange of the ratifications of the treaty of peace and the date of the imposition of the Philippine Commission tariff. They were collected by the military subordinates of the President, under his orders as Commander in Chief of the Army and Navy, which, as they construed them, required them to collect duties upon goods coming from the United States into the Philippine Islands. It appears now—and it is the settled law of this case—that the Commander in Chief, from the moment of the exchange of the ratifications of the treaty, all during this disputed

period, had no lawful authority to collect, or to cause to be collected, duties upon goods coming from the United States into those islands. It therefore is clear that if the Government can prevail at all in this case it must prevail solely upon the theory that the action of the subordinate military officers in collecting these duties has been ratified by the act of July 1, 1902, and the authority at the time wanting thereby supplied.

In order to understand this case, it seems to me that it is necessary to consider, first, What the President and his subordinate officers did with respect to the collection of duties; and, second, What Congress either knew or should be presumed to have known with respect to the action of the President and his subordinate officers and the settled law applicable to the situation in 1902; and, third, What was the intention and will of the Congress as expressed in the statute which we claim to constitute a ratification?

In order to understand the significance of the action of the President and of his subordinates during the period in which these disputed duties were collected, it has seemed to me necessary to bring before the court the whole history of the collection of duties in the Philippine Islands from the time they were first imposed by the military authorities down to the time of the enactment of the Congressional tariff in 1902; for in that way only can we understand the significance of the action taken in the disputed period.

The naval battle of Manila Bay was fought on the 1st day of May, 1898, but it was not until the 13th of

the following August that Manila yielded to the attack of our forces, and for the first time we made an effective lodgment on Philippine soil. In the meantime, on the 12th day of the preceding July, the President had made the order for the collection of these duties at the bar of this court—the order of July 12, 1898, which is as follows:

EXECUTIVE MANSION,
July 12, 1898.

> By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that, upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.
>
> Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.
>
> Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.
>
> Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.
>
> WILLIAM MCKINLEY.

This order, however, was suspended by the President and not put into practical effect until the 10th day

of the following November. In the meanwhile, duties were collected under the old Spanish tariff, with a modification to provide for the importation of merchandise from Spain. Accompanying the order is an elaborate schedule of duties with regulations and directions for the guidance of the military subordinates, which show clearly the significance of the action of the President and which are as much a part of the order as if they were written in it. I need not say that when the order imposing the tariff of duties and taxes annexed the tariff itself to the order, the annexed part of the order became a part of the order itself. It can not, therefore, properly be considered or interpreted unless the schedules and regulations, which, as I have said before, are a part of the order, are considered with what may be called the enacting part of the order itself.

There are one or two general characteristics of the order which I think it is important to ascertain with precision before entering upon a discussion of its terms in detail. In the first place it was not, in any proper sense of the word, "legislation." It was a military order—it was an order of the Commander in Chief to his subordinates. Like all general orders that are intended to reach many persons, it has the superficial form of legislation, but in substance as well as in form (except its superficial form) it is an order from a military superior to a military subordinate. In Mr. Coudert's brief, I think, it was happily termed not "legislation" but "military legislation," which is but another way of saying that it is a military order—the order of a superior to a subordinate.

In the second place it was lawful at the time it was issued, not because Mr. McKinley, as the Civil Executive of the United States, had any such power as was exercised here, but by virtue of the fact that the Constitution had annexed to the Presidential office that of Commander in Chief of the Army and Navy. I regard his authority in that respect as precisely coterminous with the authority of the commanding general in the Philippine Islands, except so far as that officer might be controlled by the orders of a superior; and the limits of that authority are not found in the Constitution, but in the laws of war.

This order levied duties by its terms—I consider this vitally important, if your Honors please, and I think it essential that I should prove it—this order by its terms imposed duties upon goods imported from all quarters of the globe into the Philippine Archipelago—all quarters, including the United States. The Philippine Islands and the United States were then foreign to each other, and it was uncertain whether they would ever bear a different relation. In fact that uncertainty continued until the time the very last vote was cast in the Senate upon the ratification of the treaty.

But it applied to the United States and imposed duties upon goods coming from them, not because the United States were foreign to the Philippine Islands or the Philippine Islands foreign to the United States, but because of the generality of the language used. It is not a case like that which was before your Honors involving the interpretation of the Dingley law. In that case duties had been collected under the Dingley

Act, which by its very terms imposed duties upon goods coming from "foreign countries." The Philippine Islands, at one time being a foreign country, came within that description, and as well went out of it by the very terms of the act itself when they ceased to be foreign. There is no such language as that in this order, and none which fairly can be interpreted to be its equivalent. I should be bound to concede, if this order of the President had in terms imposed duties upon goods coming from "foreign countries," that instantly after the exchange of the ratifications of the treaty the United States ceased to come within the terms of the order itself—just as this court held that the moment Porto Rico and the Philippines Islands ceased to be foreign countries, they ceased to come within the terms of the Dingley law, which imposed duties upon articles imported from "foreign countries." I am bound by the decisions of this court to yield assent to the proposition that if this order by its terms had imposed duties on goods coming from "foreign countries," the authority under it to impose duties upon goods coming from the United States would have ceased immediately upon the exchange of the ratifications of the treaty. I should, I say, in that case be bound by the decisions of this court to concede that this order, by its very terms, at once upon the 11th day of April ceased to be applicable to imports from the United States.

But it is on other grounds—it is because of the use of other language than that used in the Dingley law

that this order imposed duties upon goods coming from the United States. In the first place—and I am asking your Honors' attention now to page 5 of the order itself, which is the first page of the regulations—it provided that every vessel upon its arrival should be placed under military guard until duly discharged. And, as it already has been suggested, it provided a form of oath for masters of vessels of other countries than the United States, and a different form of oath for the masters of American vessels. Again, in the next paragraph, it is provided that all goods, wares, or merchandise not duly declared on the manifest shall be subject to an additional duty of 25 per cent. By the next clause every vessel is bound to produce a manifest, and there is a special provision that the manifest of a vessel coming from a port of the United States shall be verified in one way and the manifests of vessels from other countries in another way. On page 7, section 9, it is provided that after the contents of these vessels have been compared with the manifests and found to agree therewith, the duties thereon shall be computed on the face of the entry. In the next section there is the further provision that any objections to the assessment of duty must be filed by the importer before payment by him of the same, and no refund of duty will be made thereafter. We have here general provisions requiring that duties shall be computed upon the face of the entry; that objection to any duty must be m[illegible]t the time by the importer before its payment, and that no refund will be made unless such objection is stated. I could

go through the whole of this order and show that every line of it is instinct with the thought that it applies not by any express words to goods imported from a foreign country—or any particular country or countries—but by the generality of its terms to goods which come into the Philippine Archipelago from any part of the earth's surface.

But that is not all. This tariff was sent to General Otis, who was in command in the Philippine Islands. A Captain Evans, who was an expert in tariff matters, under orders from the War Department that summer, went to the Philippine Islands for the purpose of revising and perfecting this tariff, which in fact he did. On September 28 General Otis sent this cablegram:

> United States tariff regulations not yet in force, though efforts made to that end. Intend to further delay application forty days from October first, as errors and inconsistencies which require correction discovered, and need time to make correction. Believe that immediate enforcement will seriously unsettle business and result in loss of revenue. Spanish tariff now applied and working satisfactorily.

To this the Secretary of War replied on October 13 as follows:

> By direction of the President, it is hereby ordered that the operation of the order dated July 12, 1898, establishing the customs tariff and regulations for ports in the Philippine Islands in possession of the United States, shall be suspended until the 10th day of November, 1898, when the same shall take effect and be in force.

On October 13 of that year, General Otis promulgated the amended and modified tariff and put it in force from the 10th day of November, 1898. The following paragraph added in that amended tariff before it became operative is of great significance: These duties "shall be collected in uniform manner, regardless of the country of origin or of exportation." It would be difficult to find language which would show more clearly than this does that the intent of the order itself was to place upon the one side the Philippine Archipelago and upon the other side all the rest of the habitable globe; and as the trade of the rest of the globe reached the shores of the Philippine Islands to impose a tariff upon it for military purposes and for the support of the government of those islands. Moreover, although the generality of the language used to my mind shows clearly and conclusively that by its terms—not argumentatively, because the United States were foreign to the Philippine Islands—this order imposed duties on goods coming from the United States, we have in addition a confirmation of that interpretation most convincing and conclusive. In the first place, there was no exemption of goods coming from the United States. Then, does not the fact that there actually were many clear exemptions make it evident that such goods were not exempted? I will bring some of these exemptions to your Honors' attention. On page 6 there was a provision for the imposition of light dues, with the exemption from such dues, which applied to all other trading vessels, of vessels

"belonging to or employed in the service of the Government of the United States." Again, on page 7, paragraph 19, after the provision in paragraph 18 that goods of all kinds imported into the Philippines should pay wharfage, it is provided that "merchandise imported, exported, or shipped in transit for the use of the Government of the United States, and coal, shall be exempt from wharf charges." And again, on page 8, paragraph 20, it is provided that there shall be levied an ad valorem tax, in addition to the regular duties, upon all goods coming into the Philippines, whether free or dutiable." But there is an exemption as to "merchandise imported or exported for the use of the Government of the United States." A further exemption appears in article 23, page 8, in this language:

> All supplies and materials for the use of the Army and Navy of the United States shall, under suitable restrictions to be prescribed by the commanding general, be admitted without payment of duty.

On page 27, paragraph 362, are the following exemptions:

> Exemptions and reductions shall in no case be granted in favor of any industry, public establishment, corporation, society, order, or person, whatever their character, except as provided for herein.

On this same page, paragraph 363, is contained the following exemption:

> Articles purchased with the funds of the Government of the United States, for its use,

> and material of all kinds intended for works executed by the provisional administrations, and not by contract, shall be exempt from import duty.

Then there is a long special free list, in which, however, goods coming from the United States are not included.

Now with this tariff, with its exemptions, clearly in view, and the fact that the order in the following October was amended so that in express terms it caused the tariff to be applied uniformly to all imports, whatever the country of origin or of exportation, can there longer be any doubt as to its proper interpretation? I respectfully submit there can be none. For by the terms of the order itself—not argumentatively from the fact that the United States was a foreign country at that time—but by the terms of the order itself, this tariff was to be uniformly applied to all goods coming into the Philippine Islands, including goods coming into those islands from the United States.

This necessary interpretation of the order and regulations to include goods coming from the United States was the interpretation that was actually placed upon them by the military authorities who collected the duties. No interested person ever claimed, so far as I am aware, that duties collected upon goods coming from the United States were not collected in accordance with the terms of the military order. I have in my hand a letter from the Secretary of War to the Senate committee (Senate

Document 171, Fifty-seventh Congress, first session), in obedience to its direction, to which I shall refer in detail later on. It is enough now to say that it contains the correspondence between the War Department and the interested merchants trading in the Philippine Islands, who were complaining, not that the schedules did not apply, but that they were so drawn as to operate in a discriminatory manner against goods coming from the United States and in favor of goods coming from other countries. Moreover, it clearly appears that at all times the income from customs duties was necessary to the maintenance of the government of the islands, and substantially the whole of that revenue would have been lost if goods from the United States had come into the Philippines duty free. This is proved by the testimony of Judge Taft when he appeared before the Senate committee long after the exchange of the ratifications of the treaty. His testimony on this point is found on pages 149 and 150 of the report of the Committee on Insular Affairs, House of Representatives, Fifty-seventh Congress, first and second sessions.

So, then, we have this practical interpretation, which grew out of the absolute necessities of the situation, confirming the interpretation derived from the plain meaning of the words themselves; for it is not difficult to see that the government of the Philippine Islands could not have run many days without the imposition of duties upon goods coming from the United States. In fact, one of the great political questions debated

during the years under consideration was whether the duties could be constitutionally, or ought to be morally, collected upon goods imported into the Philippines from the United States, and no one dreamed of denying—what the world knew—that such duties were, in point of fact, collected. Moreover, this court unanimously decided, in the Porto Rican case, that an order which differed in no material way from the one now at the bar, by its terms—before the exchange of the ratifications of the treaty, at least—applied to goods coming from the United States (*Dooley* v. *United States*, 182 U. S., 222). I therefore conclude that by the terms of this order, duties were imposed upon goods imported into the Philippines from the United States, and as we now know, by the unanimous decision of this court, lawfully imposed down to the time of the treaty.

The next consideration to which I desire to invite your Honors' attention is that this order is not limited to the duration of the war with Spain. It is, on the contrary, unlimited in point of time. It is unlimited not only because there is no expression of limitation in it, but because the order contains a positive affirmative paragraph prescribing that it shall be unlimited. It is the last paragraph on page 28 of the Customs Tariff and Regulations, and reads as follows:

> The foregoing schedules and provisions based upon the tariff and taxing laws heretofore in operation in the Philippine Islands, including such other taxes and exactions heretofore collected, as in the discretionary judgment of the

commanding general shall be considered proper and necessary, shall be and remain in force until duly modified, suspended, or revoked.

What have we, then, on April 10, 1899, the day before the exchange of the ratifications of the treaty? We have an order from the President, as Commander in Chief, prescribing duties in such general terms as to call for their collection upon goods coming from the United States. We have an order not limited in point of its duration, but expressly by its own terms designed to be and remain in force until duly modified, suspended, or revoked. The exchange of the ratifications occurred the next day, April 11. We now know that from the moment of the exchange of the ratifications the President's power, as Commander in Chief, to impose duties in the Philippine Islands ceased and determined there, as it had ceased and determined, by the decision of this court, in Porto Rico, at least so far as duties upon importations from the United States were concerned. But the treaty did not modify, it did not suspend, it did not revoke the military order. The President still supposed that he had the authority to continue in force this order, which, as I have said, by its terms required the collection of duties upon imports from the United States. It is not too much to say that the question at that time was doubtful, because, if the opinion of four justices (instead of five) of this court had prevailed in the first Dooley case, he would have been

right in his belief that his authority as Commander in Chief continued. I do not speak of this for the purpose of throwing in the least degree any doubt upon the decision in that case, to which I yield implicitly, but only for the purpose of showing how doubtful the question was then to a man who, in the face of the world, had to assume the great responsibility of the government of the Philippine Islands, which was upon his shoulders. But whatever the President's power, his subordinates continued to obey his orders—to collect the duties. They interpreted—as our friends can not interpret to-day—they interpreted the order as the President had, as the Secretary of War had, as requiring the collection of duties upon goods coming from the United States. And they were collected in accordance with the order; unlawfully collected, we know now, but collected in accordance with the order, and in accordance with no other authority under the shining sun. Such was the order before these military subordinates. They had not the delicate duty to inquire as to its constitutionality and legal foundation, nor to solve the doubtful questions of law which were raised by the exchange of the ratifications of the treaty. Theirs not to reason why—theirs but to obey the plain terms of the order which imposed the collection of duties upon every article of merchandise as it entered the ports in the possession of the United States in the Philippine Islands. If your Honors please, a man may obey an unlawful order and still be acting in accordance with that order even though it be given with-

out authority. The proper way to determine whether a man or set of men are acting in accordance with an order is to compare their conduct with the order itself, and not by an inquiry as to whether the order rests upon any legal foundation. The amendments to this order, which are cited in our brief, show that it was treated as an existing, continuing, and operating order, and as requiring the collection of duties upon goods coming from the United States. I shall mention only such of those amendments as seem of peculiar significance in this connection.

On April 10, 1899, the Acting Secretary of War issued an order that, by direction of the President, a paragraph should be added to the "Customs Tariff and Regulations for the Philippine Islands," which was a part of the original order. This paragraph designated Manila as the chief customs port of the Philippine Islands, and two other places as subports. As this was but a day before the exchange of the ratifications (which it is fair to presume had already been arranged to occur the following day), it is inconceivable to suppose that the President would have been amending an order which he had made as Commander in Chief if he had not supposed that that order would have continued in effect for more than twenty-four hours. Knowing as he did that duties on importations from the United States had been collected under the order, it is inconceivable that he should not have amended the order in that respect if he had not intended that the collection should continue. Again, on May

3, 1899, less than a month after the exchange of the ratifications, this amendment itself was amended by an order signed by the President. The amendment is not important in itself, but it is important because of its use of the following language: "By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States, I do hereby order and direct." Here is a clear recognition of the original order, as amended, which had been issued and amended by the Commander-in-Chief, and was clearly within his authority; and a clear assertion (mistaken though as it has turned out to be) of his continuing authority as Commander in Chief to modify, and as modified to keep in force, the original order which he had issued. Again, on October 23, 1899, the Commander in Chief issued an order republishing, for the information and guidance of all concerned, the original Customs Tariff and Regulations which had been promulgated by the commanding general on October 26, 1898, being the original order of the President of July 12, 1898. We have seen that the fair interpretation of the original order — the interpretation which it actually had and which was acquiesced in by all concerned—included the exaction of duties upon goods imported from the United States. But, after all, all these amendments to which I have referred prove no more than facts which must be conceded, namely, that after the exchange of the ratifications of the treaty the original order of the President was treated as existing

and operative, and as requiring that duties upon importations from the United States should be collected.

I desire again to call your Honors' attention for a moment to the letter of the Secretary of War to which I have just referred, to show more thoroughly how this interpretation was received and acquiesced in. This document shows that on April 20, 1899, certain American merchants trading with the Philippine Islands addressed a petition to the chamber of commerce, San Francisco. They asked in substance for "a lower tariff upon goods coming from the United States." This was some days after the exchange of the ratifications of the treaty. They did not in any way suggest that duties were not payable by the terms of the order, but simply asked the chamber of commerce to intervene for the purpose of securing "a low tariff upon productions special to the United States." This petition was referred to the custom-house officer in the Philippines, who reported upon it on September 28, 1899 (as appears upon page 8, Senate Document 171), saying that he was "unable to discover a single instance where merchandise coming from and manufactured in the United States is subject to a higher duty than Spain pays on the same merchandise." He further said:

> I do find that the classification of the present tariff is in some cases prejudicial to the profitable importation of some articles which are largely produced in the United States. These prejudicial classifications are being remedied in so far as the collector of the customs has the power to act.

And General Otis made the following indorsement, under date of October 7, 1899 (page 9 of Senate document), long after the treaty had been ratified:

> The same customs duties are exacted on all goods and merchandise introduced from the United States as from Spain or any other foreign country. For a short time after the capitulation of Manila, goods purchased in Spain before the war were admitted under the old Spanish preferential rates, but that has not been done for nearly a year past.

Now, the collection of these duties continued until the enactment of the Philippine Commission tariff, to which I shall refer only briefly. It is not primarily important what the Philippine Commission tariff was. It is important simply to show the continuity of purpose. Spain had always imposed a tariff upon goods coming into the Philippine Islands. The United States had always imposed a tariff upon goods coming into the Philippines. The same Spanish tariff has existed practically since the Spanish occupation down to this moment. And yet, to judge from my friend's language this morning, one would suppose that there had been an act of guilty usurpation in demanding from these merchants the duties which they willingly paid and which they had always paid. They are entitled, may it please your Honors, to that which the law gives them—they are entitled to their pound of flesh, but they are not entitled to one drop of blood. And if I ever felt justified in resisting by every means at my command an unrighteous claim against the people of

the Philippine Islands, I feel justified in doing so to-day. I do not ask your Honors to go one step beyond the law, but I ask for the Government of the United States that attention to all its great public acts, that fair and reasonable interpretation of the language of its laws, of its President and of its Congress, to which every litigant before any court is always entitled.

The Phillippine Commission was constituted with Judge Taft as president, and, under date of April 7, 1900, in a letter to the Secretary of War, the President conferred upon them full legislative powers, including the power to make a tariff. The President appointed them his military subordinates, though they were but civilians. There was no other conceivable authority under which he had the right to appoint Judge Taft and his associate Phillippine Commissioners, except his authority as Commander in Chief of the Army and Navy of the United States. The whole tenor of the instructions to these Commissioners shows that they were understood to be military subordinates. They were practically the agents of the military power at that time. They were made to report to the War Department and all the laws which they should enact were enacted by the authority of the President of the United States. It would have been technically more exact if the expression had been "by the authority of the Commander in Chief of the Army and Navy of the United States," because, as I have said, it was only as Commander in Chief that President McKinley had any right to appoint the Commission or to confer any

powers upon it. They proceeded to the Philippines and enacted a tariff which was put into effect by an order to which I shall allude, because it shows that the original tariff now in dispute was then for the first time revoked. On July 3, 1901, this order was issued by the War Department:

JULY 3, 1901.

> By order of the President, the following statute proposed by you for the revision and amendment of the law relating to duties on imports and exports of the Philippine Archipelago, and the tonnage duties and wharf charges therein, is approved and amended, and you are authorized to enact and promulgate the same.

The statute referred to in this order by its own terms went into effect on the 15th of the following November. So that, upon July 3, 1901, the President, acting through his Secretary of War, revoked, as of the 15th of the following November, the order which he had previously put in force, an order which by its terms was to be and remain in force until suspended, modified, or revoked. Finally, Congress itself enacted, on March 8, 1902, a tariff for the Philippine Islands, which was, in substance, the tariff of the order of the President and of the Philippine Commission. In passing, I think I ought to say something about the Spooner amendment, which is contained in the army appropriation act of March 2, 1901. It conferred upon the President "all military, civil, and judicial powers necessary to govern the Philippine Islands." That is, all the powers of government were, by Con-

gressional action from that day, invested in the President of the United States, with authority and discretion to exercise them as he chose. In pursuance of this authority, he sent a cablegram at once upon the passage of this act, saying that he would continue the existing arrangement in the Philippine Islands. The existing arrangement included the tariff law, if it included anything. So that after March 2, 1901, the date of the approval of the Spooner amendment, the President had the right to keep in force such laws as he chose to enact, including the whole tariff contained in the order of July, 1898. His right from the date of the Spooner amendment to enact or adopt such a tariff as he chose is clear under a decision of this court. Your Honors have sustained a conviction under a libel act enacted by that Commission in pursuance of the authority conferred upon it by the Spooner amendment. The same reasoning which sustains the authority of the President through his Commission to enact a libel act sustains his own authority to enact or adopt a tariff act.

When Congress convened in December, 1901, this court had rendered some important decisions upon fundamental questions of constitutional law, and laid down safe guides for the action of the legislative branch of the Government. Congress is presumed to have known and understood those decisions. In this case the presumption is justified by the fact, for I believe that no cases have been more attentively studied by public men than the decisions of your Honors in the so-called "Insular cases." It is important to state

exactly what those principles before the Congress were. On May 27, 1901, your Honors decided a group of cases which established the following principles:

First. By necessary implication, from the reasoning of all the justices, goods imported into the United States from our new possessions prior to the exchange of the ratifications of the treaty of peace were dutiable under the Dingley act.

Second. The Congress, after the exchange of the ratifications of the treaty, had the constitutional power to enact a law imposing duties upon goods coming from our new possessions into the United States.

Mr. Justice HARLAN. Does the reasoning of all the judges lead to that?

The ATTORNEY-GENERAL. No, sir; that decision was by a majority of the court.

Third. The President, by virtue of the authority vested in him as Commander in Chief, had the right to exact such duties as he chose to impose upon goods coming from the United States into our new possessions after they were occupied by our military forces and prior to the exchange of the ratifications of the treaty of peace. This by a unanimous court.

Fourth. After the exchange of the ratifications of the treaty of peace, and before the action of Congress, the President, as Commander in Chief, had no authority to impose duties upon goods coming from the United States into Porto Rico.

From the moment that these decisions were announced, it became doubtful whether the President

had the right to exact duties upon goods coming into the Philippines, at least from the United States, as he was doing. In order to avoid the effect of the decision in the Dooley case, which dealt with importations into Porto Rico from the United States, it became necessary to find some valid distinction between the two cases. The only possible distinction was suggested in a dispatch from Mr. Root to Governor Taft, at Manila, on June 8, 1901, in which he stated, after setting forth the effect of the May decisions of this court, that the question of the President's power to impose duties in the Philippines was not decided by the court, and said "The most obvious distinction between the status of Porto Rico and the Philippines after the cession" is that in the latter "a state of war has continued." He says: "The President has determined to continue to impose duties as heretofore." Here is a distinct declaration, through his Secretary of War, that he had imposed duties by this order, that he understood that he was then imposing them, and that he intended to continue to impose the duties as theretofore.

On December 2, 1901, two decisions established the following principles and threw further light on the situation:

First. The Congress, after the exchange of the ratifications of the treaty, had the constitutional power to enact a law imposing duties upon goods imported into our new possessions from the United States.

Second. Goods coming into the United States from the Philippine Islands, after the exchange of the ratifi-

cations of the treaty and before action by Congress, are not dutiable under the Dingley law, the flagrancy of the insurrection in the Philippine Islands being held, with respect to such importations, not to constitute a distinction between the case of those islands and that of Porto Rico.

Now, it is perfectly obvious that this court, by the decisions I have cited, had settled every great question regarding the trade between the United States and its new possessions, save one; and that one is presented in part by the case at bar. Concisely put, that question is: What was the power of the President as Commander in Chief to exact duties upon goods coming into the Philippines, and especially upon goods coming from the United States, between the date of the exchange of the ratifications of the treaty and the date of the tariff legislation by Congress? There was no other possible aspect of the trade relations between the Philippine Islands and the United States that had not been finally settled and clearly determined by this court. There was strong reason to believe, when the December opinions were announced, that the decision in this case would be that which your Honors have rendered and declined to reopen, namely, that the Philippine situation was ruled by the Dooley case and that of the Fourteen Diamond Rings, and that the war power of the President to exact duties upon goods coming from the United States had ceased in the Philippines, as it had ceased in Porto Rico. There was an impending danger that the income de-

rived from the imposition and collection of duties upon goods from the United States, which had been absolutely essential to the continued life of the government of the Philippine Islands, might be taken away. But however probable that decision might be, the contention was still open that a different rule should be applied to the two possessions. It might still be contended that the flagrancy of the insurrection in the Philippines, while it could not properly affect the interpretation of the Dingley Act, might affect the continued existence of the war power of the President in the territory where that insurrection was raging. That contention was made by the Solicitor-General and confidently relied upon. It was the basis of the decision of the court below. It has now been finally disposed of adversely by the judgment of this whole court. When, therefore, the Congress met in December, it was clear that all the duties collected in the Philippines before the exchange of the ratifications of the treaty were collected legally, as would be all duties which might be collected thereafter under an act of Congress; and the only other duties the legality of the collection of which was the least doubtful were those exacted in the Philippines under the orders of the President in the intervening period. The total of those duties was large. They were necessary to the life of the Philippine government. They had never been covered into the Treasury of the United States, but had been expended for the government of the Philippine Islands. Congress, in the light of these facts, acted deliberately. Governor

Taft came from the Philippines. Each House conducted exhaustive investigations of the affairs of those islands, and the first pertinent fruit of those investigations was the enactment of the tariff act of March 8, 1902, which imposed duties in the Philippines and in this country upon the mutual trade. Its significance here is only that it continued down to this moment the policy of collecting duties in the Philippine Islands upon imports from the United States, substantially the same as those which has been collected upon the same traffic from November 10, 1898: First, under the military orders of the President, and, second, under the action of the Philippine Commission, resting for its authority upon the war power of the President, aided and supplemented as far as that could be done constitutionally by the Spooner amendment. In the meantime, the right of the President to collect duties, by virtue of his authority as Commander in Chief, upon goods coming from the United States had been challenged in the courts by the very cases which are now at the bar of this court, which were begun in January and March, 1902. Let me again emphasize the situation which had been created by the declarations of this court. Every conceivable question had been settled finally beyond doubt, except the one question of the authority of the President to collect, by virtue of his war power, duties upon goods coming into the Philippines. That question alone was open to dispute, and the dispute, so far as goods coming from the United States were concerned, actually had been begun by the bringing of these suits. And, as I have said before,

the question was indeed a grave one, because from the imposition of those duties income absolutely essential to the government of the Philippine Islands had been derived.

Mr. Justice HARLAN. You say that all the income essential to the government of those islands had been collected on goods from the United States? Wasn't the statement you quoted from Secretary Taft rather that if the duty was not allowed to be collected in that way the goods would come by way of the United States and that the great preponderance thus far collected had been upon goods coming elsewhere than from the United States?

The ATTORNEY-GENERAL. That is what I meant to say. I understand that the larger amount of duties were collected upon goods coming from foreign countries. The point is that if these duties on United States goods had not been imposed there would not have been sufficient revenue to support the government of the islands. The only revenue was from customs duties, and if United States goods had been free all importations would have been from the United States and the revenue would have ceased. It is, however, not safe to take the statistics of the Treasury, because many of the importations from the United States went to Hongkong and were entered at Manila as from Hongkong, so that the importations upon which a refund of these duties may be claimed are by no means shown by the statistics of the Treasury.

Now, having all these things in view, Congress enacted the law of July 1, 1902.

Mr. Justice DAY. You speak of the law passed in March, 1902?

The ATTORNEY-GENERAL. Yes, sir; the tariff law of March 8, 1902, which adopted the Philippine Commission tariff, which in turn had adopted the tariff under the military order, which in turn had adopted the old Spanish tariff law.

Mr. Justice WHITE. That was the law under which the ratification is claimed to arise?

The ATTORNEY-GENERAL. No, sir; that was the act of July.

Mr. Justice DAY. There is no language in the act of March, 1902, ratifying the collection of duties?

The ATTORNEY-GENERAL. It seems that if it was ratified at all it was by the act of July, 1902.

The other acts simply show a recognition of what the President was doing, but I will not contend until we reach the act of July 1st, 1902, that there was any ratification by Congress. But on that date Congress passed a law to ratify something. What did it ratify? We contend that it ratified that which was doubtful or illegal and needed ratification; and that it was not designed to ratify, nor did it ratify, that which was legal and needed no ratification. On the other hand, our friends claim—and they state the claim in the clearest way on page 37 of the brief of Mr. Carlisle and Mr. Ward, in this language:

> * * * its intention was that only such action of the President as this court had decided, or might thereafter decide, that he had the power to take, and only such actions of the

> subordinates as were within the terms of the order, were ratified.

That is to say, that Congress intended to ratify the actions of the President which the court had decided were legal or might thereafter decide were legal. My friend nods assent to that proposition.

Mr. COUDERT. I don't assent.

The ATTORNEY-GENERAL. And I understand it to be the claim in all the briefs that Congress, by the act of 1902, ratified the action of the President, taken by virtue of his lawful authority as Commander in Chief.

Mr. CARLISLE. We contend that Congress, by the passage of this act, proceeded to ratify nothing except what had been done in accordance with this order, and the court has decided that this action was not in accordance with the order.

The ATTORNEY-GENERAL. I still adhere to your text. I will read the language again:

> * * * its intention was that only such action of the President as this court had decided, or might thereafter decide, that he had the power to take, and only such actions of the subordinates as were within the terms of the order, were ratified.

Only action of the President which needed no ratification should be ratified? That is a reflection. It is a charge of the grossest incapacity on the part of Congress to appreciate and deal with the situation. I know that your Honors will approach this question of ratification in the light of the conditions which the history

of the times has shown to exist. Your Honors will not undertake to minimize or destroy the plain meaning of the act of Congress by any subtle play upon words or any strained interpretation of their effect, as is submitted to your Honors at the bar of this court. But, on the other hand, will give to them their natural and fair meaning and construe this act in a way that will accomplish something instead of nothing.

Mr. COUDERT. How about the collection of duties on goods coming from foreign countries—is that a very doubtful question?

The ATTORNEY-GENERAL. Yes, I am coming to that; that is the second proposition. The ratification is attacked in two ways. In the first place, it is claimed that the act ratified only that which was legal, and then another claim is made about it which I will approach in a moment. I will approach it now.

The suggestion that this act ratified duties upon goods coming from foreign countries other than the United States appears frequently in their briefs. It appears more clearly in the later briefs, and in the oral argument it is much relied upon. Our friends instinctively shrink, as Mr. Carlisle just now shrunk from his own language in his own brief, from an interpretation of this statute which would make it ratify only that which needed no ratification. He instinctively shrinks from such interpretation. He realizes that your Honors would be reluctant to adopt it, unless the very words of the statute required. So he puts forward the suggestion that the proposition was to ratify

the collection of duties upon goods coming from other countries than the United States. Now, that is a coherent thought; that is intelligible action for Congress to take. If Congress had taken action of that kind, it would not have exposed itself to the imputation to which it would have been exposed if it had ratified only that which was legal.

Mr. Justice HARLAN. When the act of July 1, 1902, was passed, had the court passed upon the validity of the President's order?

The ATTORNEY-GENERAL. No, sir; not as applied to the Philippine Islands. The court had held that a similar order, so far as it directed the collection of duties upon goods coming from the United States into Porto Rico, was without lawful authority after the exchange of the ratifications of the treaty. The court had also held that the existence of the insurrection in the Philippine Islands did not affect the interpretation of the Dingley Act, and that therefore, as with the exchange of the ratifications of the treaty the Philippine Islands ceased to be foreign territory within the meaning of the Dingley Act, duties were no longer collectible upon goods coming from the Philippine Islands, because the Dingley Act imposed duties only upon articles imported from foreign countries. But it was not until this case was decided that the court held—and now declines to reopen the question—that the existence of the insurrection did not cause the war power of the President to continue in the disturbed territory. Therefore, until this case was decided, it was not certain whether or not the President's war power continned in those islands.

I agree with my friends on the other side that the President's right to exact duties upon goods coming from foreign countries into the Philippine Islands after the exchange of the ratifications of the treaty is doubtful. I know there are intimations in the opinion of the court that the President had the right to continue to exact duties upon goods coming from foreign countries, although not upon goods coming from the United States. But they are no more than intimations. The question has not been distinctly presented to this court. And if it is held here, as it was held in the first Dooley case, that the President's power as Commander in Chief to impose duties upon goods coming from the United States had ceased because both the spirit and the letter of our laws forbade its exercise it will be but another way of expressing the same thing that was expressed in *Cross v. Harrison* (16 How., 164, 201), that the tariff law of the United States instantly went into effect in the territory acquired by the treaty of cession.

Mr. Justice HARLAN. Do you make a distinction between the power of the President as Commander in Chief to impose duties upon goods coming from the United States into the Philippines and on goods coming from the Philippines into the United States?

The ATTORNEY-GENERAL. I would if I were allowed to. But the decisions of this court, including that part of the decision in the case at bar not open for argument, it seems to me, do not permit me to do so, and I yield to them. There is nothing I should like better

than to argue that there can be no real correlation between the President's power to impose duties in the Philippines and the Congressional power to impose duties in the United States, any more than there can be a correlation between the power of Great Britain and that of this country. I believe it to be doubtful, under this decision, whether every merchant who paid duties upon goods coming into the Philippine Islands, after the exchange of the ratifications of the treaty, is not entitled to a refund of them, even if the goods came from foreign countries.

Mr. Justice BROWN. Might there not be a distinction between cases where the action had already been begun and the rights of the parties fixed at the date of the action, as was the situation in the De Lima case, and also in this case, and cases where no action has been brought to recover back?

The ATTORNEY-GENERAL. There may be some distinction, but the question belongs to the Solicitor-General's branch of this case, and I prefer, with your Honors' permission, to let him answer it.

The question as to the right of the President to exact duties upon goods coming from foreign countries into the Philippines is doubtful, under the decision of this court. It may be brought here if this decision stands. In some of its aspects it is already on the way here, and when it gets here the counsel who will then argue the case—if the Government should set up that this act of 1902 ratified the collection of these duties—would say, as they say here: First, it did not ratify

the collection of those duties because it was intended to ratify only such acts as were lawful; and, second, they would say, as they say here, that Congress had no constitutional power to ratify the collection of duties unlawfully imposed and collected.

(RECESS.)

I think I have shown to your Honors, what is apparent without my showing it, that when Congress enacted this ratification statute that body had before it every aspect of the tariff situation with respect to the Philippine Islands, and realized that every question had been settled by this court save one—the power of the President of the United States, as Commander in Chief of the Army and Navy, in the interval between the exchange of the ratifications of the treaty and the passage of the tariff act, to impose duties upon goods imported into the Philippine Islands, and especially to impose duties upon goods coming into the Philippines from the United States. With that situation clearly before it, Congress enacted the ratification statute upon which we rely. I shall now submit to the court the interpretation which I think it ought to have. The second section of that act (found on page 14 of my brief) provides: "That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, * * * together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed,

* * * *." The interpretation which I put upon this language is, that it is a ratification of the action actually "taken by the President by virtue of his authority as Commander in Chief." Congress undoubtedly did not intend to ratify anything beyond the action which was taken under that order and its amendments. It seems to me unimportant that the President was mistaken as to the extent of his authority. This language is a description of his action, not a limitation upon the action which Congress intended to ratify. It should be construed as if it read: "The action of the President heretofore actually taken by him in issuing the order of July 12 and its amendments is approved, ratified, and confirmed." On the other hand, our friends contend that that part of the statute should be construed as if it read, "The action of the President of the United States heretofore legally taken by virtue of his authority as Commander in Chief." Moreover, the statute approved the "action of the authorities of the government of the Philippine Islands, *taken in accordance with the provisions of said order and subsequent amendments.*" I think I have already shown that according to the ordinary use of language, the action taken in the collection of duties upon goods coming from the United States was taken in accordance with the order—was taken in obedience to the order; and that it is none the less in obedience to the order, none the less in accordance with the order, because the order itself was without lawful foundation. The plain purpose of the ratifying statute was to supply the authority which

was wanting at the time of the action itself. It is our contention that the facts show that this action was taken in strict obedience to and in strict accordance with the provisions and very terms of the order as properly construed. Suppose an officer had declined to obey the order to collect the duties upon importations from the United States and had said, "I doubt the constitutional authority of the President to issue that order." Suppose he had been charged before a court-martial with disobedience of orders, and convicted, and in some manner that conviction was before your Honors for review, would not your Honors say to the officer, "It was your duty to obey the order and not question the authority under which it was issued."

On the other hand, our friends suggest two alternative interpretations of this statute. Since adjournment I have refreshed my mind upon what I understand to be their position. I understand their first and main contention to be the contention that was much dwelt upon by Mr. Fuller in his opening speech, and which appears on page 37 of Mr. Carlisle's brief. There it is said that Congress used the words "'the action of the authorities of the government of the Philippine Islands *taken in accordance with the provisions* of said order and subsequent amendments,' with the intention that full force should be given to their natural meaning and in order to indicate beyond all question that it was only such action of the President as this court had decided, or might thereafter decide, that he had the power to take and only such actions of the subordinates as were

within the terms of the order, were ratified. Had Congress intended to ratify that which the court had held or might thereafter hold to be illegal and done without authority of law, it would have said so in unmistakable terms." Now I understand them, then, to adopt the position, that Congress searched carefully and industriously the decisions of this court, and the facts to which they applied, found just one principle upon which this court had unanimously agreed, namely, that the collection of duties upon imports from the United States before the exchange of the ratifications of the treaty was lawful, and ratified that collection and nothing else. It seems to me that the statement of that proposition is its own answer, and that the court would be reluctant to interpret the statute in a manner which would constitute such a reflection upon the intelligence of a coordinate branch of this Government. But, shrinking from the consequences of that interpretation, my friends now put forward, and with great emphasis, another interpretation, namely, that this statute ratified the collection of duties upon imports from countries which were foreign to the Philippine Islands after the exchange of the ratifications of the treaty. They say that the right of the President to exact such duties was doubtful. I agree that it was doubtful. I think that it was more than doubtful. I think it would be difficult to resist the claim that, if the spirit and letter of our tariff laws instantly applied to the Philippine Islands upon the exchange of the ratifications of the treaty, all duties collected under

some other tariff were illegally exacted. I think, therefore, that if Congress had desired to close up that part of the question, it would have exhibited an intelligent view of the situation and enacted appropriate legislation. But Congress actually did nothing of the kind. It is an explanation which does not explain. It is an interpretation which does not interpret. It is like an unsuccessful attempt to prove an alibi in the criminal law which always justly is regarded as a confession of guilt. The very fact that such an interpretation is an afterthought is equivalent to a confession that the first claim, that the statute ratified nothing except that which was legal, is untenable. And since that interpretation finds no foundation or color in any word of the ratifying act it seems to me their case is lost. Congress does not ratify any part of the duties collected under the order of the President. It ratifies all of the duties that were collected under the order of the President. It makes no distinction between duties, whether they were levied upon goods coming from Spain, England, or the United States. It "ratifies the action of the President as set forth in his order of July 12, 1898, and the amendments thereto;" and I believe I have shown to your Honors that that order required, by its very terms, the collection of duties upon imports from the United States, and by its very terms was to be continued until suspended, modified, or revoked.

Mr. Justice HARLAN. Was there any discussion in Congress when the act was passed?

The ATTORNEY-GENERAL. I have been unable to find it.

Mr. Justice HARLAN. Was there any discussion otherwise of a public character as to the right of the President to issue that order?

The ATTORNEY-GENERAL. I suppose there must have been very much discussion of that question, because at the time it was very clear that it was doubtful—if I may use the expression that way—whether the President did have any such right, and I have no doubt it was fully discussed. But as I must concede now that that exercise of authority was illegal, I have not thought it necessary to proceed with the argument of it. I can show the authorship of the statute, but will not do so unless I am invited.

It is urged here that there is an inconsistency between the action of Congress with respect to Porto Rico and the action which we claim Congress took with regard to the enactment of this statute. Of course, there is an inconsistency. Congress intended to be inconsistent in dealing with Porto Rico and the Philippine Islands. The whole country regarded the island of Porto Rico as finally a part of our territory. Congress intended, after the imposition of a temporary tax upon the traffic between Porto Rico and the United States, to make it absolutely free between the two territories. Congress, on March 8, 1902, at the very time it enacted the tariff law imposing duties upon traffic between the Philippine Islands and this country, already had provided by its own action that six days before the traffic between Porto Rico and the United States should be free of duty. It was an inconsistency which

was designed by Congress. It was an inconsistency which was understood by the people, because it has not yet been determined finally and irrevocably whether we shall hold the Philippine Islands permanently under our dominion or whether, after such period as is necessary to fit them for their own self-government, they will be given independence.

I hesitate to say anything about the consequences of this decision. I only say it for the purpose of inviting your Honors' attentive consideration to all the public documents which show the history of this transaction, as well as to the enactments of Congress, with a view to understanding the governmental policy which has prevailed from the moment our troops landed upon Philippine soil. It has been finally and irrevocably held that the President unlawfully exercised his authority as Commander in Chief in the collection of the duties in this case, and it will be difficult to resist the conclusion that his action was equally unlawful in imposing duties upon imports from other countries. And if it should be held—a question still open for your Honors' consideration—that this act of 1902 did not ratify the action of the President with respect to importations from the United States, I know of no method of interpreting the English language by which your Honors can hold that the exaction of duties upon goods imported from countries other than the United States was ratified. And I believe that it is as certain as that the night follows the day that if the imposition of duties upon goods imported from

the United States is illegal and was not ratified by this statute, that at least the duties collected upon goods imported from Spain, which by the treaty itself is entitled to equality of treatment with the United States in that respect, were illegally exacted. I know of no possible way by which this act, if it is held not to ratify the collection of duties upon imports from the United States, can be given an interpretation which would ratify the collection of duties upon imports from Spain. And I beg your Honors to remember that against the ratification of this statute for any purpose our friends urged that Congress under the Constitution was without power. They urged, in the first place, and they dwelt upon this at much length, that the proper interpretation of the words of this act is that they ratified nothing except that which the President had the lawful authority to do without ratification.

I intend, if your Honors please, to leave to the Solicitor-General the discussion of the power of Congress to enact the statute which has the effect that we claim this statute has, but, at his suggestion, I desire to say one word, and one word only, upon that.

This court has held, in *Dorr* v. *The United States* (195 U. S., 138), that by the Spooner amendment authority was conferred upon the President through such agencies as he might select to enact legislation for the Philippine Islands, and impliedly has held that in his dealing with that authority the constitutional provision which separates the executive, judicial, and legislative branches of the Government is not applicable.

For it has held, and without dissent upon this point at least, that a conviction for libel could be sustained under a statute enacted by the Philippine Commission, the military subordinates of the Commander in Chief, defining and describing what constitutes a libel in the Philippine Islands. If that Commission, under the authority of that act, could enact a libel law, it could enact a tariff law. It follows, then, that upon the 11th day of April, 1899, the date of the exchange of the ratifications of the treaty, Congress could have passed the Spooner amendment, and by that amendment the President, exercising the legislative power, could have put in force a tariff exactly like the one which he was then keeping in force. Congress, then, having the power at that time and continuing to have the power down to July 1, 1902, could have authorized at the time they were done these acts which the court has held illegal. Our position is that Congress could ratify on July 1, 1902, that which they could have authorized on July 11, 1898, but which without the authority of Congress was unlawful.

O

ORDER

OF THE

MILITARY GOVERNOR OF THE PHILIPPINES,

OCTOBER 26, 1898,

WITH

CUSTOMS TARIFF AND REGULATIONS ENFORCED THEREUNDER.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1906.

[This is a reprint of the order of October 26, 1898, which the Attorney-General especially referred to at the argument of the Philippine tariff case, containing on page 29 the provision that the duty, tonnage tax, wharf charges, etc., shall be collected in uniform manner regardless of the country of the origin or exportation of merchandise. See also the final paragraph, No. 372, p. 40.]

OFFICE OF THE MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS.

Manila, P. I., October 26, 1898.

General Orders, No. 10.

Referring to General Orders of the 29th ultimo from this office, wherein is recited the necessity of a careful revision of the "Customs Tariff and Regulations" prescribed by the United States Government for such portion of the Philippine Islands as may be under United States control, in order to satisfy United States Government interests and prevailing business conditions; and proclaiming, for such reasons, the postponement of the practical application of those tariff regulations until November 10th, next; it is hereby ordered that the same, amended and revised, and as now fully contained in the following printed schedule, be put in force from and after the date proclaimed, viz: November 10, 1898.

Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States the foregoing order will be proclaimed and enforced.

By Command of Major-General Otis:

THOMAS H. BARRY,
Assistant Adjutant-General.

REGULATIONS FOR THE GUIDANCE OF OFFICERS CONCERNED IN THE COLLECTION OF DUTIES ON IMPORTS AND EXPORTS, TAXES AND OTHER CHARGES AND EXACTIONS TO BE LEVIED AND COLLECTED AS A MILITARY CONTRIBUTION AT PORTS AND PLACES IN THE POSSESSION OF OR UNDER THE CONTROL OF THE FORCES OF THE UNITED STATES, IN THE PHILIPPINE ISLANDS.

ENTRANCE AND CLEARANCE OF VESSELS.

1. Every vessel shall, on arrival, be placed under military guard until duly discharged. Passengers with no dutiable property in their possession may be permitted to land without detention.

If, upon the unlading of any cargo, there shall be found goods, wares, or merchandise not duly declared on the manifest, such articles in excess shall be required to pay additional duties of 25 per cent. on the regular duties. Should any packages or articles named on the manifest be missing on the arrival of the vessel, the latter shall pay a penalty of 1 peso per ton measurement, unless such deficiency shall be satisfactorily explained or accounted for.

2. Within twenty-four hours after the arrival of any vessel the master must, under a penalty for failure of 1 peso per ton registry measurement, produce to the proper officer a manifest of her cargo, with the marks, numbers and description of the packages and the names of the respective consignees, which manifests, if the vessel be from a port in the United States, shall be certified by the collector of the port of sailing. If the vessel be from any other than a United States port, her manifest must be certified by the United States consul or com-

mercial agent at such port: if there be no United States consul or commercial agent at such port, then by the consul of any nation at peace with the United States; and the register of the vessel shall, upon her arrival in the Philippines, be deposited with the consul of the nation to which she may belong, if any there be, otherwise with the commandant at the port, until the master shall have paid such tonnage taxes and other port charges as may be due under these regulations.

3. No vessel shall be allowed to clear for another port until all her cargo has been landed or accounted for. All goods not duly entered within ten days after their arrival in port shall be landed and stored, the expense thereof to be charged against the goods.

4. Prior to the departure of any vessel from any of the ports herein designated, the master shall deposit with the proper officer a manifest, in duplicate, of the outward cargo of such vessel, specifying marks and numbers of packages, a description of their contents, with names of shippers and consignees, with a statement of the value of each separate lot; also names of passengers and their destination. A clearance will then be granted to the vessel. No prohibited or contraband goods shall be exported.

LIGHT DUES.

5. At all ports or places in the Philippines which may be in possession or under administrative control of the land or naval forces of the United States, there shall be levied the following navigation and port charge:

	Per net ton.
On each entry of a vessel from a port or place, except from another port or place in the Philippines	$0.10

6. The following shall be exempt from light dues:

A vessel belonging to or employed in the service of the Government of the United States; or a vessel of a neu-

tral foreign government not engaged in trade; or a vessel in distress: or a yacht belonging to an organized yacht club of the United States or of a neutral foreign nation.

7. The tonnage of a vessel shall be the net or register tonnage expressed in her national certificate of registry.

ENTRY OF MERCHANDISE.

8. The consignee named in the bill of lading, or the person to whom such consignee shall by endorsement, have assigned the bill of lading, shall present to the officer, duly designated for that purpose, his declaration in triplicate, an invoice describing the goods, showing their character, quantity, the name of the importer and of the vessel of importation, the place whence the goods were imported, the date of their arrival at the port of destination, the marks and numbers of the packages, the nature and quantity of their contents, and their value. The declaration shall be signed by the importer, who must certify to the truth of all the statements contained therein.

9. After the packages and contents have been duly compared with the declaration, and found to agree therewith, the duty due thereon will be computed on the face of the entry, and, after the payment of the proper duties and charges, an order for the delivery of the packages and contents will be issued by the proper officer.

10. Any objections to the assessment of duty must be filed by the importer before the payment by him of the same, and no refund of duty will be made thereafter.

11. Goods found to be fraudulently invoiced, either as to character or quantity, and all goods attempted to be introduced without permit, shall be confiscated.

12. No delivery of imported merchandise shall be made to the importer unless he shall have duly paid the duties assessed thereon.

13. Any goods, wares, or merchandise not duly en-

tered for payment of duty within ninety days after importation shall be sold at auction by order of the commandant after five days' public notice conspicuously posted at the port. The proceeds of such sale will be kept for ten days, subject to the demand of the importer after deduction of the proper duties on the goods and all expenses of storage and sale. All merchandise remaining in the "godowns" of the custom house longer than fifteen days shall be charged with storage at the rate of 5 pesos per ton per month by measurement or dead weight, as shown by bill of lading.

14. All seized and confiscated merchandise will be sold in like manner, and the proceeds, after deduction of expenses, will be turned over to the officer duly designated for that purpose.

15. Merchandise originally destined for some port or place in the Philippines, not in the possession of the United States forces, may be entered at one of the designated ports. Vessels may likewise enter, although originally cleared for a port in the Philippines not in possession of the United States.

WHARF CHARGES.

16. Goods of all kinds exported through ports of the Philippines declared open by the United States shall pay one peso per 1,000 kilograms gross, as a charge for wharfage, whatever be the port of destination or nationality of the exporting vessel.

17. Goods of all kinds imported into ports of the Philippines declared open by the United States, and destined for trans-shipment to other ports of the Philippines declared open by the United States, shall pay a charge for wharfage of one-half of one peso per 1,000 kilograms gross at the port of trans-shipment.

18. Merchandise imported, exported, or shipped in transit for the use of the Government of the United States, including coal, shall be exempt from wharf charges.

HARBOR AND COMMERCIAL IMPROVEMENT CHARGES.

19. In addition to customs duties and other exactions there shall be levied a charge of 8 per centum, on the value, as per schedule, of all merchandise, free or dutiable, imported into the Philippines, and 10 per cent. additional on the amount of the import duty; but merchandise imported or exported for the use of the Government of the United States, including coal, shall be exempt from this charge.

20. The officer duly designated for that purpose shall receive all customs duties, fees, and charges, and shall without delay pay the same over to such officer as shall be designated by the commanding general. Records shall be kept and accounts rendered of all money transactions, and receipts in duplicate shall be taken by the officer paying over such moneys, one copy to be retained by him as his official voucher and the other transmitted by mail with his accounts to the War Department, Washington, D. C.

21. Such public buildings as may be suitable for the purpose shall be used and occupied for the transaction of business and for the storage of imports.

22. All supplies and materials for the use of the Army and Navy of the United States shall, under suitable restrictions to be prescribed by the commanding general, be admitted without payment of duty.

RATES OF DUTY ON IMPORTS.

CLASS I.—STONES, EARTHS, MINERALS, GLASS AND GLASSWARE, AND CERAMIC PRODUCTS.

GROUP 1.—*Stones and earthern productions employed in building, arts and industry.*

		Pesos.
23. Marble, jasper and alabaster, in the rough or in dressed pieces, squared and prepared for taking the form	100 kilos	0.08

		Pesos.
24. Marble, jasper and alabaster, cut into squares, slabs, or steps of any dimension, polished or not	100 kilos	0.75
25. Marble, jasper and alabaster, worked up and chiseled into any object, polished or not, other than ornamental or articles of luxury	100 kilos	1.60
26. Other stones employed in building, arts and industry; also cement	100 kilos	.50

GROUP 2.—*Coal.*

27. Coal and coke (*a*)	ton of 1,000 kilos	0.50

GROUP 3.—*Schists, bitumen, and their derivations.*

28. Tar, pitch, asphalt, bitumen, and schists; also unrefined creosote (*b*)	100 kilos	0.09
29. Naphtha, vaseline, crude petroleum, natural and crude oils derived from schist (*b*)	100 kilos	4.00
30. Benzine, gasoline, petroleum, and other mineral oils, refined (*b*)	100 kilos	4.50

(*a*) Coal and coke shall be cleared in conformity to the weight indicated in the certificate issued to the master of the vessel by the consul at the port of shipment, proving the quantity received on board according to the charter party and the bills of lading, which documents the said consul shall demand to see for the purpose. In case of doubt the customs may verify the quantity.

(*b*) Crude oils derived from schist shall be understood to be those derived from the first distillation, distinguishable by their yellowish color and density of from 0.900° to 0.920°, or from 66 to 57½ of the centesimal areometer, equal to from 24.69° to 21.48° Cartier.

Petroleums having the following properties are considered as crude natural petroleums:

First. Those which, when distilled gradually and continuously in a glass apparatus at a temperature of 300° Centigrade, leave a residium exceeding 20 per cent of their primitive weight.

Second. When this residue in its turn leaves 1 per cent. at least of coke in proportion to the total weight of petroleum assayed.

Third. When, according to E. Granier's apparatus, they are found to be inflammable at a temperature lower than 16° Centigrade.

All petroleums and other mineral oils not possessing the above characteristics shall be considered as refined.

GROUP 4.—*Ores.*

		Pesos.
31. Ores	ton of 1,000 kilos	0.25

GROUP 5.—*Glass and glassware.*

32. Common or ordinary hollow glassware (*a*)	100 kilos	1.60
33. Crystal, and glass imitating it, also gilt or silvered in the interior (*b*)	100 kilos	6.00
34. Glass and crystal, in plates and sheets	100 kilos	3.00
35. Glass and crystal, silvered, and glasses for spectacles and watches	kilo	.05

GROUP 6.—*Pottery, earthenware and porcelain.*

36. Clay, in bricks, squares and tiles, for building purposes, furnaces, etc. (*c*)	100 kilos	0.02
37. Clay, in large and small paving tiles; tiles of colored faience, varnished tiles and piping (*d*)	100 kilos	.40
38. Faience and wares of fine clay (*e*)	do	6.00
39. Porcelain	do	10.00

(*a*) Are included in this number bottles, demijohns and flasks for oil, wine, drugs, perfumery and chemicals, provided they be not cut; and unpolished glass of more than 12 millimeters in thickness for roofs and pavements.

(*b*) Are also included in this number bottles, tumblers, glasses and other objects for table service, ornament and lighting, whether of crystal or white or colored glass, as well as beads.

(*c*) Only rough bricks, squares and tiles of baked earth or clay employed in the construction of walls, furnaces, etc., are to be included in this number.

(*d*) No. 37 includes tiles for pavements and small tiles for mosaic work, and also the articles for building contained in No. 36, when glazed, painted, enameled and made of washed or sifted earths.

(*e*) The articles of fine clay included in this number are dinner services, kitchen earthenware, flower vases, ornaments and the like.

CLASS II.—METALS, AND ALL MANUFACTURES IN WHICH A METAL ENTERS AS A PRINCIPAL ELEMENT.

GROUP 1.—*Gold, silver and platinum.*

		Pesos.
40.	Gold and silver in jewelry or plate, (*a*) even set with pearls or precious stones (*a*) ----------hectog	5.00
41.	Gold, silver or platinum worked into other objects (*b*, *c*)----------hectog	.50

GROUP 2.—*Iron and steel.* (*d*)

42.	Cast iron, in pigs, and old iron-----100 kilos		0.50
43.	Cast iron, in tubes of all kinds-----	do	.95
44.	Cast iron, in common manufactures-	do	1.50
45.	Cast iron, in fine manufactures; *i. e.*, those polished, enameled with a coating of porcelain, or with ornaments of other metals ----------100 kilos		3.50
46.	Wrought iron and steel rails-------	do	1.60
47.	Wrought iron and steel in sheets of a thickness of 6 millimeters or more, and bolts--- ----------100 kilos		1.80
48.	A. Wrought iron and steel in bars of any form, in sheets up to 6 millimeters in thickness; axles, tires, and springs for carriages; and hoop iron----------100 kilos		2.60

(*a*) In the classification of jewelry or ornaments will be included all small articles of luxury valuable on account of workmanship, whatever their denomination, and generally intended for the ornament of persons of both sexes.

(*b*) Utensils for domestic use, articles for church use and generally all large objects used for the ornamentation of houses are included in this number.

(*c*) In clearing finished articles, including jewelry and articles of gold, silver or platinum filled with mastic, a reasonable tare allowance shall be made for such mastic.

(*d*) Articles of malleable cast iron shall pay the duties stipulated for manufactures and articles of wrought iron.

		Pesos.
B. Wrought iron in rough bars (tochos) (*a*)	100 kilos	2.60
49. Wrought iron and steel, in large pieces, made of bar iron, or of bar or sheet iron secured together by means of rivets, destined for buildings, bridges, etc	100 kilos	3.20
50. Iron wire (*b*)	do	1.60
51. Iron nails and screws, even with brass heads	100 kilos	4.00
52. Wrought-iron pipes	do	2.60
53. Wire gauze, not further manufactured	100 kilos	6.00
54. Wares of wrought iron, not elsewhere mentioned, including those enameled with porcelain and those combined with other metals; also pipes covered with sheet brass	100 kilos	8.00
55. Unutilizable articles of iron	do	1.00
56. Tin plate	do	5.00
57. Tin-plate manufactures	do	8.00
58. Needles, pens, parts of clockwork, and other similar articles of iron or steel	kilo	1.65
59. Knives, carvers, razors and penknives	do	.40
60. Scissors of all kinds	do	.40
61. Side arms and detached pieces for the same	kilo	.40
62. Firearms, barrels and detached pieces for the same (*c*)	kilo	1.00

(*a*) By "iron in rough bars" (tochos) shall be understood rough wrought iron in a mass or prism, and round iron in any other form containing dross. Wrought iron containing dross has an unequal and rough surface. Wrought iron in a mass or prism, free from dross, will be subject to duty as iron in bars. In case of doubt, this iron shall be submitted for examination to the inspector of mines, who will determine its classification.

(*b*) Only round iron, the thickness of which does not exceed No. 1, English gauge, *i. e.*, 8 millimeters in diameter, shall be considered as wire.

(*c*) In order that pieces of firearms may pay according to this number, they must be shaped and bear file marks on the outer surface.

GROUP 3.—*Copper and its alloys.*

		Pesos.
63. Copper of first fusion, and old copper	100 kilos	2.00
64. Copper and brass in bars and ingots, and old brass	100 kilos	2.50
65. Copper and brass in sheets and nails, and copper wire	100 kilos	10.00
66. Copper and brass in tubes and large pieces not finished, such as bottoms of boilers, etc	100 kilos	10.00
67. Brass wire	do	10.00
68. Copper, brass, or bronze gauze, not worked	100 kilos	15.00
69. Bronze, unworked	do	2.00
70. Copper, bronze, or brass, worked, and all alloys of common metal in which copper enters, in hardware, even varnished	kilo	.25
71. Said metals and alloys, in gilt, silvered, or nickeled articles	kilo	.35

GROUP 4.—*Other metals.*

72. Tin in ingots	100 kilos	2.50
73. Zinc in bars, lumps, or pigs	do	1.20
74. Zinc in sheets, nails, and wire	do	5.00
75. Zinc in manufactured articles, even varnished	kilo	.25
76. All other metals and alloys not mentioned, in sheets, lumps, nails, tubes, etc	100 kilos	10.00
77. The same metals, manufactured, varnished or not	kilo	.20
78. The same metals, and zinc in gilt, silvered or nickeled wares	kilo	.30

CLASS III.—SUBSTANCES EMPLOYED IN PHARMACY, PERFUMERY AND CHEMICAL INDUSTRIES.

GROUP 1.—*Simple drugs.*

79. Cocoanut and palm oil, and other heavy oils	100 kilos	.20

		Pesos.
80. Other vegetable oils, except olive oil	100 kilos	4.60
81. Dyewoods and tannery bark	do	.02
82. Madder or rubian	do	4.00
83. Rape, flax and other oleaginous seeds, including copra or cocoanut	100 kilos	.04
84. Other vegetable products, not specially mentioned	100 kilos	2.00
85. Animal products employed in medicine	do	.60

GROUP 2.—*Colors, dyes and varnishes.*

86. Ochres and natural earths, for painting	100 kilos	.02
87. Indigo and cochineal	do	2.00
88. Dyeing extracts	do	.60
89. Garancine, pure or mixed with madder	kilo	.15
90. Varnishes	100 kilos	4.80
91. Colors, in powder or in lumps (*a*)	do	1.50
92. Colors, prepared, and inks	do	5.00
93. Colors derived from coal, and other artificial colors (*b*)	kilo	.15

GROUP 3.—*Chemical and pharmaceutical products.*

94. Muriatic and chlorhydric acid	100 kilos	0.20
95. Nitric acid	do	.80
96. Sulphuric acid	do	.30
97. Alkaloids and their salts	kilos	6.00

(*a*) The colors included in this number are those composed of a metallic base, which for use are mixed with oil or turpentine and are generally insoluble in water, alcohol or ether. They are rarely crystalized and are almost always in powder and lumps, such as white lead, chrome yellow, vermillion, Prussian and Thenardt blue, English green, and parrot green ("papagayo").

(*b*) The colors classed in this number are those known as artificial or organic products, in which mineral substances rarely enter. They are generally crystalized, and are soluble in water, alcohol or ether. They are employed in dyeing and printing, with or without mordant, rather than in painting, such as picric acid, green aldeide, English violet, rosaline and its salts, naphthaline colors, artificial alizarine, etc.

		Pesos.
98. Alum	100 kilos	0.30
99. Sulphur	do	.05
100. Barillas, natural and artificial (*a*)	do	.20
101. Alkaline carbonates, alkalis, caustic and ammoniacal salts, except sulphate	100 kilos	.20
102. Chloride of lime	do	.30
103. Chloride of potassium, sulphate of soda, chloride, carbonate and sulphate of magnesia	100 kilos	.10
104. Chloride of sodium (common salt)	do	.65
105. Glues and albumen	do	2.40
106. Phosphorus	kilo	.07
107. Nitrate of potash (saltpeter)	100 kilos	.30
108. Nitrate of soda and sulphate of ammoniac	100 kilos	.05
109. Oxides of lead	do	.40
110. Sulphate and pyrolignite of iron	do	.30
111. Pills, capsules, jujubes, and the like (*b*)	kilo	1.00
112. Pharmaceutical products not specified (*b*)	do	.80
113. Chemical products not specified	do	.20

GROUP 4.—*Various.*

114. Starch	kilo	.02
115. Feculæ for industrial uses, and dextrine	100 kilos	.20
116. Common soap	do	3.75
117. Paraffine, stearine, wax and spermaceti, in lumps	100 kilos	3.30

(*a*) By barillas, natural and artificial, are understood carbonates of soda, impure, containing carbon.

(*b*) The products or substances included in Nos. 111 and 112 shall be examined by the pharmaceutical inspectors, who, in conjunction with the customs, will make a declaration as follows: "The goods cleared are those expressed in the declaration and are (or are not) admitted to importation by virtue of their formulas having been published (here state where), or their composition having been discovered by analysis made by ———."

		Pesos.
118.	Paraffine, stearine, wax and spermaceti, manufactured, and wooden matches	10.00 per 100 kilos
119.	Perfumery and essences	.40 per kilo
120.	Gunpowder, explosive compounds, and fuses for mines	.10 per kilo
121.	Tobacco, manufactured	2.40 do
122.	Tobacco, not manufactured	.20 do

Class IV.—Cotton and its manufactures.

Group 1.—*Raw cotton.*

123.	Raw cotton, with or without seed	*0.24 per 100 kilos

Group 2.—*Cotton yarns.*

124.	Cotton, spun, and yarn twisted in one or two threads, unbleached, bleached, or dyed, up to No. 35, inclusive (*a*)	*0.25 per kilo
125.	The same from No. 36 upward (*a*)	* .35 do
126.	The same twisted with three or more threads, unbleached, bleached or dyed	.50 per kilo

Group 3.—*Tissues.*

Close-woven tissues, plain, unbleached, bleached, or dyed, in the piece or in handkerchiefs, having:

127.	A. Up to 25 threads, inclusive	*0.20 per kilo
	B. Up to 35 threads, inclusive	* .32 do

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*Add surtax of 20 per cent. on duty.

(*a*) To ascertain the number, according to the English system (the system adopted in this tariff), to which a cotton yarn corresponds, any number of meters of yarn may be taken, and this number is to be multiplied by the invariable factor 59 (this being the number of centigrammes a meter of cotton yarn of a single thread No. 1 weighs). The product of the above multiplication is to be divided by the number of centigrammes that the length of yarn tested may weigh. The quotient multiplied by the number of threads will then give the corresponding English number, to which 7 or 10 per cent. is to be added, according as the cotton of more than one thread be only spun or spun and dyed.

			Pesos.
128.	36 threads and above	kilo	*0.44
	Tissues, printed, twilled, and figured in the loom, having:		
129.	A. Up to 25 threads, inclusive	kilo	.25
	B. Up to 35 threads, inclusive (*a*)	do	.40
130.	36 threads and above	do	* .55
	Tissues transparent, such as muslins, cambrics, lawns, organdies and gauzes of all kinds, having:		
131.	A. Up to 30 threads, inclusive	kilo	* .44
	B. 31 threads and above	do	* .64
132.	Quiltings and piqués	do	.50
133.	Velveteens, corduroys, and other thick tissues for wearing apparel	kilo	.52
134.	Tulles	do	1.00
135.	Lace, except crochet (*b*)	do	*1.25
136.	Crochet lace, made by hand or in the loom	kilo	.70
137.	Hoisery piece goods, jerseys and drawers	do	.50
138.	Hoisery in stockings, socks, gloves, and other articles	kilo	.60

CLASS V.—HEMP, FLAX, ALOE, JUTE, AND OTHER VEGETABLE FIBERS AND THEIR MANUFACTURES.

GROUP 1.—*Raw.*

139.	Hemp, raw or hackled	100 kilos	0.40
140.	Flax, raw or hackled	do	.40
141.	Jute, aloe, and other vegetable fibers	do	.04

*Add surtax of 20 per cent on duty.

(*a*) The number of threads is to be ascertained by count of the threads contained in a square of 6 millimeters, counting the weft and the warp. The instrument called "thread counter" is to be employed for this purpose.

(*b*) Lace of a maximum width of 10 centimeters shall be dutiable according to this number; that wider shall be included in No. 134 as tulles.

GROUP 2.—*Yarns.*

		Pesos.
142.	Yarn of hemp, linen, or jute	kilo 0.22
143.	Yarn of aloe, and other vegetable fibers (*a*)	100 kilos 1.56
144.	Threads, twisted, of two or more ends, and fishing nets	kilo .30
145.	Cordage (*b*) for vessels	100 kilos 4.16

GROUP 3.—*Tissues.* (*c*)

146.	Plain tissues of hemp and flax, with or without mixture of cotton, up to 10 threads, inclusive	kilo *0.20
147.	Plain tissues of hemp and flax, from 11 to 24 threads, inclusive	kilo * .44
148.	Plain tissues of hemp and flax, of 25 threads and above	kilo * .60
149.	Plain tissues of hemp and flax, twilled or diapered	kilo .40
150.	Lace, net, and crochet work	do 4.80
151.	Knitted tissues	do 1.20
152.	Plain tissues of jute, aloe, or other vegetable fibers, with or without mixture of cotton	kilo .15

* Add surtax of 20 per cent. on duty.

(*a*) As yarn of jute is considered twisted thread of one end the thickness of which is equal to or less than the English No. 1, that exceeding this number is considered as cordage. To ascertain this number any number of meters of yarn may be taken, and this number is to be multiplied by the factor 165 (1 meter of yarn of jute, No. 1, weighs 165 centigrams), and divided by the number of centigrams that the length of the yarn tested may weigh. The quotient will then give the corresponding English number.

(*b*) By the cordage paying under this heading shall be understood, hemp, flax, or jute yarn, twisted in two or more strands, 10 meters of which weigh more than 5 grams.

(*c*) In linen tissues paying according to the number of threads, the threads (both warp and woof) contained in a space of 6 millimeters will be counted.

		Pesos.
153. Twilled or diapered tissues of the same materials, with or without mixture of cotton	kilo	0.50

CLASS VI.—WOOLS, BRISTLES, HAIR, HORSEHAIR, AND THEIR MANUFACTURES.

GROUP 1.—*Raw.*

154. Bristles, horsehair and other hair, including hair of the camel, vacuña, and of the Angora and cashmere goat; wool unwashed (*a*), washed, combed or carded (*b*), and waste wool, carded (*c*)	100 kilos	2.00

GROUP 2.—*Yarns.*

155. Woolen and worsted yarns, spun and twisted, unbleached or in the grease (*d*)	kilo	0.35
156. Woolen and worsted yarns, washed or bleached	kilo	.60
157. Woolen and worsted yarns, dyed	do	* .70

GROUP 3.—*Tissues.*

158. Woolen carpets, pure or mixed with other materials	kilo	*0.50

* Add surtax of 20 per cent. on duty.

(*a*) Wool will be considered as unwashed when after having been washed with sulphuret of carbon it is found to lose more than 10 per cent. of its weight.

(*b*) Wool, the threads of which exceed 10 centimeters in length, is considered as long wool.

(*c*) The waste from carding included in this number is that obtained from the picking and unraveling of old rags and is almost always dyed and common. Waste resulting from the spinning of long wool shall also be classed herein.

(*d*) Worsted yarn will be considered unbleached or in the grease if, when washed with sulphuret of carbon, it loses more than 10 per cent. of its weight.

		Pesos.
159.	Felts of pure wool, or mixed with other materials ---------- kilo	0.20
160.	Blankets of wool, pure, or mixed with other materials (*a*) ---------- kilo	.40
161.	Hosiery, whether mixed or not with cotton or other vegetable fibers ---------- kilo	.48
162.	Cloths and all other similar tissues of wool, waste wool, hair, or a mixture of these materials ---------- kilo	.80
163.	The same tissues, when the warp is wholly of cotton or other vegetable fibers, also astrakhans and plushes of the same material ---------- kilo	.60
164.	All other tissues of pure wool, waste wool, hair, or a mixture of these materials -- kilo	1.00
165.	The same tissues, when the warp is wholly of cotton or other vegetable fibers ---- kilo	.80
166.	Tissues of bristles or hair, with or without mixture of cotton or other vegetable fibers ---------- kilo	.70

Class VII.—Silk and its manufactures.

Group 1.—*Yarn.*

167.	Silk, raw, and spun, twisted or not; floss silk, combed or carded (*b*), spun, twisted or not (*b*) ---------- kilo	*2.50

Group 2.—*Tissues.*

168.	Tissues, plain or twilled ---------- kilo	*4.00
169.	Velvets and plushes ---------- do	4.80

*Add surtax of 20 per cent. on duty.

(*a*) Plaids and the like are not included in this number. They shall pay duty according to the component tissue.

(*b*) All silk waste, the fibers of which do not exceed 20 centimeters in length, is considered silk.

		Pesos.
170.	Tissues of floss or waste silk, of raw silk and of waste silk mixed with silk (*a*)_____kilo	3.00
171.	Tulles and lace, of silk or waste silk____do	8.00
172.	Knitted tissues of silk or waste silk_____do	4.40
173.	Velvets and plushes of silk or waste silk, with the warp or weft wholly of cotton or other vegetable fibers_____kilo	3.60
174.	Other tissues of silk or waste silk, with the warp or weft wholly of cotton or other vegetable fibers _____kilo	2.30
175.	Tissues of silk or waste silk, with the warp or weft wholly of wool or hair_____kilo	2.50

Class VIII.—Paper and its applications.

Group 1.—*Printing and writing paper.*

176.	Paper, endless, unsized and half-sized for printing _____kilo		0.06
	Paper, endless, for writing, lithographing or engraving _____kilo	*	.08
	Paper, cut hand-made and ruled paper__do		.12

Group 2.—*Paper, printed, engraved, or photographed.*

177.	Books, bound or unbound, and other printed matter in Spanish (*b*)_____kilo	0.10
	Books, bound, in foreign languages (*b*)_do	.05
	Engravings, maps and drawings_____do	.25

Group 3.—*Wall paper.*

178.	Wall paper, with gold, silver, wool, or glass _____kilo	0.40
	Wall paper, of other kinds_____do	.10

*Add surtax of 20 per cent. on duty.

(*a*) All silk waste, the fibers of which do not exceed 20 centimeters in length, is considered silk.

(*b*) Book binding shall be dutiable according to the component material. When the books are stitched or bound in boards, they shall pay duty as printed matter, on gross weight. Newspapers printed abroad require no permit for their introduction into the Philippine Islands.

GROUP 4.—*Pasteboard and various papers.*

			Pesos.
179.	Straw paper, common packing paper, and sand or glass paper	kilo	*0.04
	Other paper not specially mentioned	do	.08
	Cardboard in sheets, in boxes lined with ordinary paper (*a*), and unfinished articles of pasteboard or "carton-pierre"	kilo	.04
	The same articles finished, and pasteboard boxes with ornaments, or lined with fine paper or other materials	kilo	.30

CLASS IX.—WOOD AND OTHER VEGETABLE MATERIALS EMPLOYED IN MANUFACTURES, AND ARTICLES MANUFACTURED THEREWITH.

GROUP 1.—*Wood.*

180.	Staves	thousand	0.40
181.	Ordinary wood, in boards, even cut, planed and dove-tailed for boxes or floorings; planks, beams, rafters, masts and timber for shipbuilding	cubic meter	.55
182.	Fine wood for cabinet-makers, in boards, deals, trunks, or logs	100 kilos	.11
183.	Fine wood for cabinet-makers, sawn or in veneers	100 kilos	.90
184.	Coopers' wares, fitted together or not	do	*2.00

GROUP 2.—*Furniture and wooden manufactures.* (*b*)

185. Ordinary wood manufactured into any kind of article, turned or not, painted or varnished, and mouldings carved and var-

* Add surtax of 20 per cent. on duty.

(*a*) Boxes of pasteboard, lined with more or less common paper, which serve for packing handkerchiefs, shirt-fronts, buttons, stuffs, etc., shall be dutiable according to this number. Paper pulp in imperforated sheets or those which are not perforated at the expense of the importer at the time of clearance, shall likewise be dutiable according to this number.

(*b*) Marble slabs for furniture will be taxed according to No. 25 of the tariff if they are presented separate from the objects to which they belong.

		Pesos.
	nished, or prepared for gilding, also furniture of bent wood, even if painted and varnished ----------100 kilos	*2.00
186.	Fine wood manufactured into furniture, and other wares, turned, carved, polished or varnished, and the same wares of common wood veneered with fine wood; furniture covered with stuffs, except with silk or leather, and gilt moldings------100 kilos	*6.00
187.	The same articles, gilt, inlaid or veneered with mother-of-pearl or other fine materials, and ornamented with metal, and furniture covered with stuffs of silk or with leather----------100 kilos	*10.00

GROUP 3.—*Various.*

188.	Charcoal, fire-wood, and other vegetable combustibles ----------100 kilos		0.10
189.	Cork ----------	do	.18
190.	Wooden hoops and trellis for fencing	do	* .20
191.	Rushes, esparto, vegetable hair, cane, osiers, fine straw, palm, and other analogous materials, unmanufactured--------100 kilos		.05
192.	The same materials, manufactured	do	*6.05

CLASS X.

GROUP 1.—*Animals, skins, and animal products employed in industry.*

193.	Horses ----------each		20.00
194.	Mules, asses and cattle----------	do	10.00
195.	Pigs ---------- -------	do	2.70
196.	Sheep, goats, and animals not otherwise mentioned ----------each		* .50

GROUP 2.—*Skins and leather.*

197.	Skins and hides, untanned--------100 kilos		1.20

*Add surtax of 20 per cent on duty.

		Pesos.
198.	Varnished leather and calfskin, tanned or curried ---------- kilo	0.64
199.	Other hides, tanned or curried, including sole leather ---------- kilo	.24
200.	Leather belting for machinery ---------- do	.20
201.	Peltries for clothing and trimming, in their natural state or prepared ---------- kilo	.25
202.	Peltries in made-up articles ---------- do	1.80
203.	Gloves of leather ---------- do	5.00
204.	A. Boots of all kinds, of leather or tissue pair ----------	* .40
	B. Shoes of all kinds ---------- pair	* .26
	C. Slippers and pumps, also common shoes generally worn by Chinese ---------- pair	* .10
	D. Boots and shoes of all kinds for children shall pay one-half of the above duties, according to classification.*	
205.	Saddlers' and harness-makers' wares (a) kilo ----------	* .75
206.	Other articles of leather or lined with the same ---------- kilo	1.00

GROUP 3.—*Feathers.*

207.	Feathers for ornament, in their natural state or manufactured ----------	kilo	3.00
	Other feathers and feather dusters ----	do	.40

GROUP 4.—*Other animal remains.*

208.	Animal fats ----------	100 kilos	*0.20
209.	Animal manures of all kinds ------	do	.01
210.	Intestines ----------	kilo	.04
211.	Other animal remains not mentioned, not manufactured ----------	100 kilos	.10

*Add surtax of 20 per cent. on duty.

(a) Saddlers' and harness-makers' wares comprise such articles as harness, saddles, bridles, gear of horses, mules, carriages, etc., all sorts of stable trappings, articles for traveling, such as bags, portmanteaus, trunks, hat boxes, and other articles made of leather or lined with leather or skin.

CLASS XI.—INSTRUMENTS, MACHINERY, AND APPARATUS EMPLOYED IN AGRICULTURE, INDUSTRY, AND LOCOMOTION.

GROUP 1.—*Musical instruments, clocks, and watches.*

			Pesos.
212.	Pianos (*a*)	each	25.00
213.	Harmoniums and cabinet organs	do	4.00
214.	Gold watches	do	4.00
215.	Watches of silver or other metals	do	2.00
216.	Common clocks with weights, and alarm clocks (*b*)	each	1.00
217.	Works for wall clocks, or mantelpiece clocks, finished, with or without cases, and chronometers (*c*)	each	1.12

GROUP 2.—*Apparatus and machines.*

218.	Weighing machines	100 kilos	5.50
219.	Agricultural machines (*d*)	do	.20
220.	Motors	do	.50

(*a*) Strung frames for pianos shall pay as pianos, though they be not imported with all the pieces constituting that instrument.

(*b*) By alarm clocks shall be understood those fitted with an alarm bell and not running longer than 48 hours, whether they have the same mechanism for striking both the hours and the alarm, or separate mechanisms for each.

(*c*) Cases, stands, glass shades, and other accessories will be dutiable as manufactured articles, according to their component material.

Clockworks for wall or table clocks, unfinished, and brass pieces for the same, will be taxed according to No. 49 of the tariff. Unfinished pieces are those which are only roughly filed, which have no escapements, the dial or hands of which are not adjusted, and the last wheel of which is not crenated. When clocks are imported within cases on stands, etc., and the importer does not wish to separate them for their examination, the works and the dial will be reckoned as weighing 1 kilogram and the rest will pay as stated above.

(*d*) These machines are those employed by farmers and agriculturists for preparing the ground and gathering the crops, as also those employed in order to clean the crops and improve them without essentially changing their nature.

		Pesos.
221.	Machines of copper and its alloys, for industrial purposes, and detached parts of the same metals (*a*)----------100 kilos	5.50
	Machines and detached parts (*b*) of other materials, for industrial purposes----------100 kilos	1.80

GROUP 3.—*Carriages.*

222.	Coaches and berlins of four seats, with or without hoods; new, used or repaired----------each	50.00
223.	Berlins of two seats, with or without folding seats, with or without hoods; omnibuses with more than fifteen seats; new, used or repaired ----------each	25.00
224.	Carriages not enumerated in the above headings ----------each	12.50

(*a*) Machines, and separate pieces of the same, of copper and its alloys, or in combination with other materials, shall also be taxed under this heading, provided the above metals predominate in weight.

(*b*) It will be necessary to prove to what manufacture or to what industry woolen hose and filters are destined for them to be assessed in this number. For the definition of parts of machinery, the following rules will be observed:

First. A separate piece of a machine is understood to be any object which is not expressly specified by name under some heading of the tariff, and which by its shape, and by the manner in which it is presented for clearance in the custom-house, though not completely finished, may be considered as exclusively destined for a machine and can have no other application. If it be imported completely finished it must pay under one of the headings of the tariff referring to machinery.

Second. The importer of detached parts of machinery may, should he deem it convenient, request, when making the clearing, that the duty be levied on the component material instead of paying the duty stipulated for machines.

Third. Tubes, bars, axles, screws, bolts, sheets, plates, boiler bottoms, wire, and other articles expressly taxed in the tariff must pay duty accordingly, though they be destined for machinery.

Fourth. Tools, instruments, and utensils employed in the arts and industries cannot be considered parts of machinery, as far as the customs tariff is concerned, and must pay duty according to the materials of which they are composed.

			Pesos.
225.	Passenger carriages for railways and tramways, and finished wooden parts for same	100 kilos	7.50
226.	All other railway carriages and finished wooden parts for same	100 kilos	2.17
	Carts and handcarts	do	2.00

CLASS XII.—ALIMENTARY SUBSTANCES.

GROUP 1.—*Meat and fish.*

227.	Live and dead poultry and small game	pair	0.05
228.	Meat, salted, and jerked beef	kilo	.08
229.	Pork and lard, including bacon	do	.15
230.	Other kinds of meat	do	.09
231.	Butter	do	.20
232.	Salt cod and stockfish	do	.04
233.	Fresh fish, or with the salt indispensable for its preservation	kilo	.01
234.	Fish, salted, smoked and pickled	do	.06
235.	Shellfish	do	.05

GROUP 2.—*Grain and vegetables.*

236.	Rice, husked or not	100 kilos	.75
237.	Wheat	do	.60
238.	Wheat flour (*a*)	do	2.10
239.	Other cereals	do	.50
240.	Flour of same	do	1.00
241.	Pulse	kilo	.02

GROUP 3.—*Garden produce and fruits.*

242.	Garden produce	kilo	.02
243.	Fruits	do	.04

GROUP 4.—*Colonial products.*

244.	A Sugar, raw	kilo	0.02
	B Sugar, refined	do	.10

(*a*) To ascertain whether products presented for clearance are flour or groats, a sample thereof shall be placed in sieve No. 80 (silk tissue with 80 openings to a French square inch). If the product passes through this sieve it shall be considered as flour; if not, as groats.

		Pesos.
245. Cocoa, of all kinds and origin	kilo	.12
246. Coffee, of all kinds and origin	do	.10
247. Cinnamon, of all kinds and origin	do	.12
248. Cloves	do	.14
249. Pepper	do	.07
250. Tea, of all kinds and origin	do	.20

GROUP 5.—*Oils and beverages.*

251. Olive oil	kilo	.12
252. Common brandy of vinic alcohol	liter	.09
253. A. Brandy, flavored with aniseed, composed brandies and liquors of vinic alcohol	liter	.20
B. Common brandy, flavored with aniseed, composed brandies and liquors not exclusively made of vinic alcohol, *i. e.*, those known as industrial	liter	.36
254. Beer and cider in wood, 5.50 per hectoliter; in bottles, 7.75 per hectoliter.		
255. Wines, sparkling	liter	.25
256. Wines, other	do	.12

GROUP 6.—*Seeds and forage.*

257. Seeds not mentioned and carob beans	100 kilos	.32
258. Forage and bran	do	.10

GROUP 7.—*Various.*

259. Alimentary preserves, pork-butchers' produce, mustard and sauces	kilo	.20
260. Chocolate	do	.20
261. Sweetmeats	do	.20
262. Eggs	hundred	.25
263. Pastes for soups, alimentary feculæ, bread and unsweetened biscuit	kilo	.04
264. Cheese	do	.15

		Pesos.
265. Honey and molasses (*a*)	kilo	0.01

CLASS XIII.—*Various.*

266. Ornaments of every kind, not mentioned in the following numbers, other than those of gold or silver	kilo	3.00
267. Amber, horn, jet, whalebone, bone, tortoise shell, coral, meerschaum, ivory, mother-of pearl and paste, in the rough or cut, even in strips or sheets	kilo	.01
268. Amber, jet, tortoise shell, coral, ivory, mother-of-pearl and aventurine, manufactured in ornaments of all kinds	kilo	5.00
269. Horn, whalebone, meerschaum, bone and paste in imitation of the substances last above specified, manufactured	kilo	.50
270. Walking sticks and sticks for umbrellas and parasols (*b*)	hundred	5.00
271. Buttons of all sorts, except those of gold or silver	kilo	1.00
272. Cartridges, without projectiles or bullets, for firearms, the importation of which is permitted	kilo	.11
273. Cartridges with projectiles or bullets for the same firearms	kilo	.15
274. Percussion caps for firearms	do	.12
275. Cases of fine woods, leather, and those lined with silk and other of similar kind, with or without fittings, for writing, sewing and toilet purposes, or to contain perfumery, liquids or comestibles	kilo	1.50

(*a*) Honey and treacle, which is the viscous residue of crystallized sugar, of a reddish-brown color more or less intense and of a sweet but somewhat bitter taste, will also be appraised by this article. It weighs from 1,374 to 1,427 grams per liter, and at 15° C. registers from 40° to 44° Baumé.

(*b*) Sword sticks shall pay the duty fixed for the swords they contain, and shall, in addition, pay as walking sticks.

		Pesos.
276.	The same of common woods, cardboard, wicker and other of similar kind, with or without fittings for the aforesaid purposes ---------- kilo	.60
277.	India rubber and gutta-percha manufactured ---------- 100 kilos	.60
278.	India rubber in sheets and tubes ---------- kilo	.15
279.	India rubber in threads ---------- do	.10
280.	India rubber manufactured in any shape or into any kind of article ---------- kilo	.44
281.	Oilcloths and tarpaulin, for floors and packing purposes ---------- kilo	.07
282.	Oilcloths and tarpaulin of other classes ---------- do	.16
283.	Toys and games, except those of tortoise shell, ivory, mother-of-pearl, gold or silver ---------- kilo	.22
284.	Wicks, for lamps and candles ---------- do	.12
285.	Silk umbrellas and parasols ---------- each	.60
286.	Umbrellas and parasols covered with other stuffs ---------- each	.28
287.	Trimmings of silk (*a*) ---------- kilo	2.80
288.	Trimmings of wool (*b*) ---------- do	1.40
289.	Trimmings of all other kinds ---------- do	.80
290.	Oil paintings ---------- each	.20
291.	Straw hats and bonnets ---------- do	.32
292.	Other sorts of hats and bonnets, trimmed and finished (*c*) ---------- each	.40
293.	Hats, not trimmed, and bonnets ---------- do	.20
294.	Hats and bonnets, of all kinds and of any material, with milliners' work ---------- each	1.50

(*a*) Trimmings which contain more than 40 per cent of silk of their total weight shall pay duty as silk trimmings.

(*b*) Trimmings which contain more than 40 per cent of wool, or of wool and silk, of their total weight shall pay as woolen trimmings.

(*c*) Felt hats shall be considered as trimmed when they have more work than what is indispensable to shape the crown.

In order to avoid abuses the samples declared for free entry must have cuts at every 20 centimeters of their width, so as to render them unfit for any other purpose.

321. Samples of trimming in small pieces, of no commercial value or possible application.

322. Gold, silver and platinum in broken-up jewelry or table services, bars, sheets, coins, pieces, dust and scrap.

323. Gold, silver and platinum in articles manufactured and stamped in the Philippine Islands.

324. Gypsum (sulphate of lime).

ARTICLES FREE OF DUTY, SUBJECT TO THE FOLLOWING CONDITIONS.

325. Wearing apparel, toilet objects and articles for personal use, bed and table linen, books, portable tools and instruments, theatrical costumes, jewels and table services bearing evident signs of having been used, imported by travelers in their luggage in quantities proportionate to their class, profession and position.

When travelers do not bring their baggage with them the clearing of the same may be made by the conductor or persons authorized for the purpose, provided they prove, to the satisfaction of the administration, that the effects are destined for private use.

Works of fine art acquired by the government, academies or other official corporations, and destined for museums, galleries, or art schools, when due proof is given as to their destination.

Archæological and numismatical objects for public museums, academies and scientific and artistic corporations, on proof of their destination.(*a*)

(*a*) Reproductions shall be classed as artistic works when only one copy of each original is imported and when intended for any of the above-mentioned official corporations, on condition that these reproductions are cast in gypsum or bronze. Copies imported by merchants or private persons shall not enjoy this exemption, as the free entry is only granted on proof that the copies are intended for public establishments.

Specimens and collections of mineralogy, botany, and zoology, and small models for public museums, public schools, academies, and scientific and artistic corporations, on proof of their destination.

If the regulations in each case are not complied with, or if the examination be not entirely satisfactory, the exemption will be annuled and the duties stipulated in the tariff will be collected.

ARTICLES FREE OF DUTY, SUBJECT TO THE FORMALITIES DETERMINED FOR EACH CASE BY THE CUSTOMS REGULATIONS.

326. Casks, sacks, and large recipients of metal, imported with goods dutiable separately from such recipients and when they are to be exported.

327. Carriages, trained animals, portable theaters, panoramas, wax figures and other similar objects for public entertainment, imported temporarily.

328. Furniture of persons coming to settle in the Philippine Islands, which has been in use by them.

329. Foreign articles destined to exhibitions held in the Philippine Islands.

330. Submarine telegraph cables.

331. Pumps intended for the salvage of vessels.

332. Parts of machinery, pieces of metal, and wood imported for the repair of foreign vessels which have entered ports of the Philippine Islands through stress of weather.

GOODS NOT SPECIALLY CLASSED IN THE TARIFF.

333. Yarns composed of two or more textile materials shall pay the duty assessed on the material paying the higher duty.

The warp of tissues is to be considered as the totality of the threads which lie in the longitudinal sense, whether they form the foundation of the same or

whether they may have been added in order to form patterns or to give more body to the stuff, even though such threads may be cut or show a want of continuity. The weft shall be considered the totality of the threads which cross the warp of the tissue and combine the same conditions of helping to form patterns or add to the body of the stuff.

334. Tissues with the warp of cotton and the weft of another vegetable material, or vice versa, shall pay in accordance with the numbers of group 3 of class 5 to which they correspond, according to their nature.

Tissues which have the weft entirely made up of cotton and the warp entirely of wool or of wool and cotton, whatever the proportion of the mixture may be, shall be considered as woolen tissues mixed with cotton.

Tissues composed of two materials shall be taxed as follows:

a. Tissues composed of vegetable fibers and those of wool or hair, the weft or warp of which is mixed with silk or floss-silk threads, shall not be considered as tissues mixed with silk when the weight of this material does not exceed 5 per cent. of the total weight of the tissue.

b. Tissues the warp or weft of which is composed of threads of vegetable fibers and silk, or of threads of wool, hair and silk, shall be taxed as tissues of vegetable fibers or of wool, or of hair when the weight of the silk on both sides of the stuff does not exceed 5 per cent. of the total weight of the tissue. If the silk threads surpass 5 per cent., but do not exceed 10 per cent., the tissues shall be taxed as silk tissue mixed, according to numbers 173 to 175, inclusive, of the tariff; if they exceed 10 per cent., they shall be taxed according to the numbers 168 to 172, inclusive, according to the class and nature of the tissue.

c. Tissues, the warp of which is composed of silk and the weft of cotton or other vegetable fibers mixed with

silk, and those of which the warp is of silk and the weft of wool or hair mixed with silk, shall always be classed as pure silk tissues, and the numbers relating to such tissues shall be applied according to their class and nature, whatever be the proportion of silk in the weft. The same rule shall be observed when the weft is entirely composed of silk and the warp of mixed materials.

Tissues composed of threads of three different materials shall pay as follows:

Warp or weft.	Weft or warp.	Will be considered as—
Cotton threads	Flax or hemp threads and those of other vegetable fibers.	Tissues of flax or hemp.
Threads of vegetable fiber.	Threads of vegetable fibers and those of wool or hair.	Tissues of vegetable fibers mixed with wool.
Do	Threads of vegetable fibers and silk.	Tissues of vegetable fibers mixed with silk.
Do	Threads of wool and silk.	Do.
Threads of wool or hair.	Threads of two or more vegetable fibers.	Tissues of vegetable fibers mixed with wool.
Do	Threads of vegetable fibers, wool or hair.	Tissues of wool.
Do	Threads of vegetable fibers and silk.	Tissues of wool mixed with silk.
Threads of silk	Threads of different vegetable fibers.	Tissues of vegetable fibers mixed with silk.
Threads of silk	Threads of vegetable fibers and wool or hair.	Tissues of silk mixed with wool.
Threads of cotton, flax or hemp.	Threads of flax, hemp, or other vegetable materials.	Tissues of hemp or flax.
Threads of vegetable fibers and wool or hair.	Threads of vegetable fibers and silk.	Tissues of wool mixed with silk.
Do	Threads of vegetable fibers wool and silk.	Do.
Threads of vegetable fibers wool and silk.	....do	Tissues of silk.
Threads of cotton and floss silk.	Threads of wool and floss silk.	Tissues of floss silk.
Threads of wool	Threads of wool, cotton and silk.	Tissues of silk mixed with wool.

When the highest taxed thread, whether weft or warp, entering in tissues composed of three or more different materials does not exceed by 10 per cent. the total weight of the tissue, such thread shall not be considered in the payment of duties, and the duty on tissues mixed with other materials shall be applied.

335. Tulles shall pay the duty on the material forming the ground, and should this be mixed, the duty of the predominant material.

336. Shawls with fringes shall pay, including the weight of fringes, according to the class of the tissue of which they are made.

Tissues embroidered by hand or machine, not in a loom, and those mixed with fine or imitation metals, whether embroidered or not, shall pay the duty corresponding to their class, with a surtax of 50 per cent.

337. Ready-made clothing, including body linen, whether completely finished or only stitched or seamed, and knitted tissues, festooned, shall pay on their total weight the duties fixed for the material of which they may be composed in their exterior part, with a surtax of 50 per cent.

338. Articles of clothing made of knitted tissues are exempt from the above-mentioned additional duty, and will pay duty according to the respective tariff number without any increase, on condition, however, that they have not been cut from the piece and have not passed through the hands of tailors or milliners. In the latter case they will be subject to the additional duty levied on ready-made clothing and linen articles.

339. Wreckage of foreign vessels lost on the coasts of the Philippine Islands shall pay 8 per cent. ad valorem on their selling price at public auction. This sale shall be effected conformably to the formalities prescribed by the ordinances.

340. Floating docks, whatever their power, size or construction, shall pay a duty of 6,250 pesos.

341. The duty on articles composed of two or more materials shall be levied according to the following rules:

a. In cases not provided for in the tariff, and when the value of the article is determined by the exterior material, the classification shall be made according to the corresponding number of this material.

b. Articles which, by their nature and application, are composed of two different materials (for instance, tools of iron), shall be taxed according to the material predominating in weight.

c. When the mixture of different materials has been made in order to evade the payment of the duties on any article, as for instance, a mixture of flour and bran, of earth and a soluble chemical product, the duty of the material paying the highest duty shall be levied.

PACKAGES AND RECIPIENTS.

342. By exterior package is understood that which is visible when the package is unopened. All the others contained therein are considered to be interior packages.

The following articles shall pay on the gross weight when they are contained in a single package:

Oils and greases; meat, fish and intestines when imported in brine; scales and machinery; chemical products and drugs; also all other articles enumerated in Nos. 26, 28, 31, 36, 76, 85, 86, 182, 188, 191, 201, 209, and 211, tariff schedules.

343. Should any of the articles mentioned in the preceding paragraph be imported in two or more packages, or in packets contained in the exterior package, only the weight of the interior packages or packets shall be included in the weight of the goods.

All other goods, including buttons and haberdashery, packed in pasteboard boxes, shall pay duty on paper wrappings, ribbons, packets, or interior packages, pro-

vided, always, that they are not fancy boxes, etc., assessed separately.

344. Boxes and cases in general, paper wrappings or cardboard for shirt fronts, and paper used for wrapping up shawls of Chinese silk, the exterior covering as well as the paper placed between the folds, and the fine gold foil, shall be taxed separately under their proper class.

345. Percussion caps for firearms, hooks and eyes, pins, eyelet holes of metal, detached buttons, steel pens, games and toys, instruments of science and art, and other similar objects, shall pay with the weight of the interior cases or boxes containing them, and in which they are generally retailed.

346. Vessels containing alkaloids and their salts, brandy, liquors, beer, cider, and wines shall be assessed separately, according to their respective materials.

347. The rollers, boards, and pieces of cardboard around which fabrics are wrapped, including wire gauze, oilcloth, trimmings, ribbons, etc., as well as the cardboard bobbins on which yarn is wound, shall be deducted from the dutiable weight of such articles.

348. Articles contained in double sacks, or in a sack and another distinct covering, shall be assessed with that immediately covering the goods. Tea shall be taxed with all the interior packages.

349. Casks, barrels, and large metal receptacles shall pay duty according to their class, except when they contain goods which pay on the gross weight.

350. Sacks and packing cloth sewn in the shape of sacks, serving as packages, shall pay 2 centimes of a peso each, except when they contain goods which pay on the gross weight.

351. When goods subject to duty on the gross weight and articles paying on the net weight are contained in one and the same exterior package, the gross weight shall be proportionately reduced.

352. When packages of goods are subject to a higher duty than the goods themselves, being other than those generally employed or when they can be used for another purpose, they shall be taxed at the rate corresponding to their class.

TARE ALLOWANCE.

353. The following percentage shall be deducted, as tare, from the gross weight of the goods mentioned below:

	Per cent.
Steel, in cases	10
Cinnamon, in boxes	20
Cinnamon, in bags	8
Phosphorus, in tin boxes	30
Phosphorus, in tin boxes inclosed in wooden boxes	50
Garancine, in casks	20
Yarns, in bales	3
Tin plate, in cases	10
Faience, porcelain and fine earthenware, in cases or casks	30
Faience, porcelain and fine earthenware, in crates	16
Glass and crystal, hollow or flat, silvered or not, in cases or casks	40
Glass and crystal and common thin window glass, in a single box	20

354. Glass and crystal contained in crates are not subject to the above tare. By crate is meant a box made of boards, such boards being separated one from the other in such manner that the open spaces between them are equal to, or larger than, the boards themselves.

355. The above-mentioned tares shall be deducted even when the packages contain other goods not subject to the legal tare, provided, however, that such goods do not exceed 50 per cent. of the gross weight. When they exceed this limit the provisions of this disposition shall

not be applied and the packages shall be taxed according to their class.

Special tare allowance.

	Per cent.
Cotton and flax thread on wooden spools: For the spools only	30
Silk and floss silk thread on wooden spools: For the spools only	45
Trimming, etc.: For the interiors of wood, paste or similar materials, except those of textile materials (of the net and exclusive weight of the articles)	10
Perfumery, in flasks, pots and small boxes, for retail sale: For all the interior packages and recipients	25

356. Soaps, essences for liquors and perfumery not imported in the form above mentioned shall pay with interior packages and receptacles.

Whenever duties are assessed according to weight, a proper allowance shall be made for the weight of the outside case, cask, or other package containing the goods, unless otherwise provided for; and duties shall be assessed upon the weight or quantity of the contents as actually found on arrival, but no allowance shall be made for damage occurring on the voyage except in case of marine disaster.

REIMPORTATION OF NATIONAL PRODUCTS.

357. Goods, fruits, and articles of the Philippine Islands exported abroad and reimported, owing to their not having been sold at the place of destination, shall be exempt from the payment of duty, provided, always, that they are enclosed in the same packages and bear the same marks and that they are accompanied by certificates of the consular officer, or, should such functionary not exist, of the local authority, attesting that the goods, produce, or effects of the country are reimported for the above-stated reason.

358. Abaca, raw, is exempt from the production of the aforesaid certificate. The following articles may likewise be imported free of duty:

359. Paintings which are works of art, and have been exported with a custom-house certificate, provided that on their return the number of that document is stated or its duplicate produced for comparison with the original.

360. Books, when, on their exportation, the number of the copies, the title of the work, and the name of the editor have been stated in the export certificate.

361. Copper coins returned from foreign countries, if, on examination, it is seen that they have been coined legitimately.

362. Articles returned from foreign exhibitions.

363. Articles of the Philippine Islands returned from foreign countries, the entry of which was prohibited in the place of destination.

ARTICLES PROHIBITED.

364. Arms of war, projectiles, and their ammunitions, except with special consent of the military authorities.

365. Paintings, figures, or any other objects offensive to morality.

MISCELLANEOUS PROVISIONS.

366. Exemptions and reductions shall in no case be granted in favor of any industry, public establishment, corporation, society, order, or person, whatever their character, except as provided for herein.

367. Articles purchased with the funds of the Government of the United States for its use, and material of all kinds intended for works executed by the provisional administrations, and not by contract, shall be exempt from duty.

368. The metrical system of weights and measures

in use by the Spanish Government will be continued. The kilogram is equivalent to 2.2046 pounds.

369. The monetary unit of the Philippines is the silver peso of the mint.

370. The current money in circulation in the Philippines shall be received for duties, taxes, and other exactions, in the manner and upon the same basis of valuation theretofore prevailing as that in use prior to the military and naval occupation.

371. Official stamps shall be used as heretofore on all custom-house papers, as per official schedule:

	Pesos.
On the entrance of a vessel from a foreign port the stamp shall represent	1.00
On the clearance of a vessel to a foreign port	2.00
On bill of health	1.00
Transfer of vessel to American registry	10.00

372. The foregoing schedules and provisions, based upon the tariff and taxing laws heretofore in operation in the Philippine Islands, including such other taxes and exactions heretofore collected, as in the discretionary judgment of the commanding general shall be considered proper and necessary, shall be and remain in force until duly modified, suspended, or revoked.

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Supreme Court, U. S.
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JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

October Term, 1904.

WARNER BARNES & CO., Limited, *Appellants*,
v.
THE UNITED STATES, *Appellee*.

No. 466.

Brief on Re-hearing of Herbert & Micou, representing Certain Claimants having Interests Similar to Those of Appellants.

H. A. HERBERT.
BENJ. MICOU.

October 9, 1906.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

WARNER BARNES & CO., LIMITED, *Appellants,*
v.
THE UNITED STATES, *Appellee.*
} No. 466.

Brief on Re-hearing of Herbert & Micou, representing Certain Claimants having Interests Similar to Those of Appellants.

BRIEF.

In the above case the court has given leave to file petitions for a re-hearing, addressed solely to the two points, Whether Congress ratified the collection of the sums to be recovered in the suits, and Whether it had the power to do so?

In the brief filed by us on the hearing in this case we discussed quite fully the two points to which the present petitions for re-hearing are to be addressed.

The discussion of the point, that Congress did not ratify the collection of these sums, is found in that brief from pages 14 to 21.

Of the point, that Congress was without the power to ratify, from pages 21 to 29.

We ask the court to consider now as our connected pre-

sentation the discussion of those two points as found in that brief, which brief is on file.

Here we will confine ourselves to pointing out what we consider to be the fallacy of the Government's contention that Congress ratified the collection of these sums.

The brief of the Government is in a great measure a review of the petition and brief which it filed accompanying its application for a rehearing, numerous references being made to that petition and brief, the brief saying:

> "We respectfully ask the court to read in connection with this brief the passages in our earlier briefs to which we have referred herein. Those citations aid the logical development of our argument, and it does not seem necessary to lengthen this brief by reprinting and incorporating here the passages in question."
>
> Pp. 31–32, Attorney-General's brief.

It is in the brief filed on the application for a re-hearing that are really set forth the facts relied on to show ratification, and we believe we can more logically answer the Government's position by taking up and discussing the first brief rather than the one just filed, and we will therefore adopt that procedure.

There is a petition for a re-hearing by the Solicitor-General accompanied by a brief of the Attorney-General on the petition. In this brief the Attorney-General says that he concurs "in everything the Solicitor-General in the main petition for rehearing has said." He then proceeds with a statement of facts and an argument thereon in an attempt to establish ratification by Congress. His contention in its last analysis is:

That it was within the President's authority as Commander-in-Chief to levy these duties because the President willed to levy them under that authority. Congress ratified what the President did by virtue of his authority

as Commander-in-Chief, therefore it ratified the levying of these duties.

The premise is false, and it necessarily follows that the conclusion is. It is not surprising, and is illustrative of the Government's position, that while the Attorney-General starts out to confine his brief to ratification, the Solicitor-General, with everything in whose petition the Attorney-General concurs (pp. 1–2, Attorney-General's first brief), brings up at the following:

> "That the Government also rests on the war power as competent during the whole period, and has sought to establish that ratification was not necessary at all."
>
> P. 14, Solicitor-General's petition.

For while ostensibly contending for ratification the Attorney-General's brief really rests on the idea of the war power as competent during the whole period.

Eliminate that which this court has said in closing the *Dooley* case, viz., that —

> "the authority of the President as Commander-in-Chief to exact duties upon imports from the United States ceased with ratification of the treaty of peace, and her (Porto Rico's) right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject,"

and substitute therefor, that —

> "the authority of the President to levy duties, as Commander-in-Chief of the Army and Navy, is only limited by his will,"

and, as stated by the Solicitor-General, ratification was not necessary at all, provided it could be shown (which we do not admit) that the President willed that he had the authority to levy these duties. If this court, however, is correct, and the authority of the President as Commander-

in-Chief to levy duties ceased when peace was made and the territory we were occupying ceased to be foreign, then the Government's argument can not prevail, that duties levied after his authority had ceased were ratified by ratification, July 1, 1902, of the action of the President taken *by virtue of the authority vested in him* as Commander-in-Chief of the Army and Navy, in his order of July 12, 1898, together with subsequent amendments to that order.

The argument, that it is necessary to hold that Congress ratified the levying of the duties here in question in order that the action of the President can be squared with his lawful power (p. 18, Attorney-General's first brief) is fallacious. The legislation relied on to show ratification was passed July 1, 1902. The Porto Rican cases were decided May 27, 1901. In those cases it had been contended—and the same contention was made in these cases and abandoned only after the cases reached this court—that the authority of the President as Commander-in-Chief to levy these duties ceased on December 10, 1898, the date the treaty was concluded and signed at Paris, and not on April 11, 1899, the date the treaty was ratified. Contrary to this contention of the claimants, this court in the Porto Rican cases held that the duties levied between December 10, 1898, and April 11, 1899, were levied by virtue of the authority vested in the President as Commander-in-Chief. Congress could therefore very properly ratify the levying of duties during that period. By the language used in Section 2 of the Act of July 1, 1902, Congress certainly did not extend ratification any further than to acts done by virtue of the authority vested in the President as Commander-in-Chief; and presumably it did this with full knowledge of the decision of this court in the *Dooley* case, prescribing the extent of the President's authority upon this subject.

When it comes to squaring action with lawful power, which, under our form of government, is to yield—the action, or the lawful power?

The gist of the Government's argument is that the President decided that there continued, after the treaty of peace with Spain, a recognized state of war in the Philippines, and that he intended to levy these duties as a military necessity of that war, by virtue of his authority as Commander-in-Chief. The Government cites, to sustain this view, that Secretary Root in his cablegram of June 8, 1901, to the Chairman of the Philippine Commission, construed the decisions of this court in the Porto Rican cases to have drawn a distinction between Porto Rico and the Philippines, in that a state of war continued in the Philippines. The true meaning of this cablegram we will consider later in its connection with the other facts relied on to show the President's intentions; but in the light of the conduct of the military operations in the Philippines whereby recognition of belligerency to the insurgents was most pointedly denied, the quotation from Secretary Root in this cablegram would under no circumstances show that this court was wrong when it held, in the *Diamond Rings* case as well as in this case, that there had never been a recognized state of war in the Philippines after the ratification of the treaty of peace. Upon the idea that the court was wrong in this rests the whole argument of ratification; yet the court precluded, by its limitation of the points to which it will confine consideration on the re-hearing, re-opening the question of a recognized state of war in the Philippines after peace with Spain.

Discussion of Attorney-General's Statement of Fact.

The duties for which claim is made in the cases before this court were collected between April 11, 1899, and Oc-

tober 25, 1901, and under the order of July 12, 1898. There were no amendments to that order that in any way affected the schedule of duties established by the order.

The first brief of the Attorney-General recites (pp. 2 to 4) that there was a suspension of the order of July 12, 1898, until November 10, 1898, when a tariff which was substantially the same as originally accompanied the order was put into effect.

That in December, 1898, these tariff regulations were, by order of the military governor, amended by striking out two words.

That April 10, 1899, there was a paragraph added to the tariff regulations.

We ask the court to bear in mind that these changes were before the ratification of the treaty. In other words, during the war with Spain; and that they in no way affected the rate of duties as levied under the order of July 12, 1898. Therefore it is a subject of no concern in this case whether these changes were ratified by Congress or not, for the following statement from the opinion of the court is absolutely correct:

> "The duties were levied under an order of the President dated July 12, 1898."

All that Sec. 2 of the Act of July 1, 1902, could possibly have ratified would have been collections under the order of July 12, 1898, and any subsequent amendments thereto, during the period that said order and amendments could have force and effect by virtue of the authority vested in the President as Commander-in-Chief.

Mr. Justice Holmes in the opinion states:

> "Apart from the question of the duration of the President's order, it plainly was an order intended to deal with imports from foreign countries only, and Philippine ports not in the actual military control of the United States."

The opinion is criticised for overlooking amendments to the order of July 12, 1898, but as there were no amendments under which duties were levied the learned judge naturally speaks only of the order.

May 3, 1899, after the treaty of peace, the President issued an order prescribing certain collection districts for customs purposes in the Philippines. It is contended (pp. 5 and 6, Attorney-General's first brief) that this was an amendment to the order of July 12, 1898.

The Honorable Attorney-General quotes the following from the latter part of the opinion:

> "The approval of the action of the authorities is confined to those which were in accordance with the order, which, as we already have intimated, the collection of these duties was not,"

and insists that the approval is *ex industria* extended to include those (actions) which were taken in accordance with subsequent amendments (pp. 15 and 16 of his first brief).

The Honorable Attorney-General evidently overlooks the fact, never out of mind in the clear though terse opinion of the court, viz: that the duties sued for were levied under the President's order of July 12, 1898. This being true, and nothing claimed in this suit having been levied under any subsequent amendment to the order of July 12, it is immaterial whether there were any subsequent amendments, or if so, whether Congress approved the same.

The order of May 3, 1899, prescribing certain collection districts for customs purposes in the Philippines, did not change the tariff fixed by the order of July 12, 1898. Therefore, as stated above, it matters not here whether that order amended the order of July 12, 1898. It did not amend it in any particular that affects this case.

That suffices to answer the Government's argument

that subsequent amendments were ratified; but while on the subject, we beg to state that we are constrained to differ with the Honorable Attorney-General in his view that this order was an amendment of the order of July 12, 1898. He says (p. 5 of his first brief):

> "Now, this order of May 3, 1899, is wholly ineffective and meaningless unless construed as an amendment of the order of July 12."

From the necessities of the case, the right to administer the government of the Philippines continued in the military commander after the ratification of the treaty and until further action by Congress. This though the right to exact duties upon imports from the United States had ceased. The President had the right, after the treaty had been ratified, until Congress acted on the subject, to administer the government of the Philippines, which undoubtedly included the right to establish collection districts for customs purposes, though not to levy duties upon goods that came from the United States; therefore this order prescribing collection districts would not, as contended, be ineffective and meaningless unless construed as an amendment of the order of July 12, 1898.

The Honorable Attorney-General says (p. 19 of his first brief):

> "The statement of facts will have utterly failed in in its purpose if it does not show that by the order of May 3, 1899, the President intended to amend the order of July 12, 1898, by treating it in force after the war and by continuing it with a few amendments, that he intended thereby to impose duties on goods coming from the United States, and that the collection of duties accordingly was known to him and approved by him."

Why is such stress laid upon the order of May 3, 1899, being an amendment to the order of July 12, 1898? As

already seen, it was not under that order, but under the order of July 12, 1898, that the duties here sued for were collected, and ratification of the order of May 3, 1899, could have no effect on the right of claimants. It is perhaps unconsciously, but nevertheless for an indirect purpose, that it is insisted that this order is an amendment of the one under which these duties were levied. To sustain the ratification theory the exigency requires that this court be shaken from the bed-rock on which rest the Insular cases, viz: that the authority of the President as Commander-in-Chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace. Unless this court can be brought to the view that that authority continued after the treaty was ratified, then the Government must lose, for it is too plain for argument that nothing done under the order of July 12, 1898, is ratified by Congress except action taken *by virtue of the authority vested in the President as Commander-in-Chief.*

How does the Government attempt to shake this court from its position regarding the President's authority? By trying to instil into the order of July 12, 1898 (which was a measure taken with reference to the war with Spain alone, and plainly intended to deal with imports from foreign countries), new life after it had expired, by contending that after such time it was amended. This is the real interest the Government has in establishing that the order of May 3, 1899, was an amendment of the order of July 12, 1898. It really matters not an iota whether Congress has ratified the order of May 3, 1899; but it matters everything whether the authority of the President to levy duties on goods from the United States under the order of July 12, 1898, ceased April 11, 1899. The order of May 3, 1899, can not however by this indirection be put to the use of overturning the decision of this court

in the *Dooley* case and made to establish the fact that the President's authority to levy duties on goods coming from the United States did not cease with the ratification of the treaty.

Besides the order cited and just discussed, to try and establish amendment to the order of July 12, 1898, the Honorable Attorney-General's first brief cites other facts from which it is argued that President McKinley intended this order to be, not what Mr. Justice Holmes states it to have been, a measure taken with reference to the war with Spain alone, but precisely what this court has said it was not, viz: a power in blank for any military occasion which might turn up in the future.

We will briefly refer to these facts. Most of them do not require any discussion.

1. That an inquiry was made of the Secretary of War by an American firm relative to the duties imposed on whiskey entering the Islands, which upon reference through official channels received an indorsement from the collector, that the classification undoubtedly discriminated against American whiskies of a certain class, but does not check their importation (p. 6, Attorney-General's first brief).

2. That there was a petition from the Chamber of Commerce at San Francisco, for a reduction of duties, which complained of discrimination against American goods; which petition was forwarded to the President, was referred through the regular official channels to the Philippines, and returned with an endorsement that uniform duties were imposed on goods from Spain and the United States (pp. 6 and 7 of the first brief).

3. That there was a continuing correspondence and discussion concerning the tariff, between the Military Governor and the Secretary of War, the latter directing, in June, 1900, the Military Governor to appoint a board

to revise the customs tariff and regulations for the Islands. That this board's report was transmitted to the Philippine Commission, with directions that the new tariff as recommended should be submitted to the Secretary of War for action, and after approval by him, be promulgated.

That the report asked for was forwarded to the Secretary of War, and that it contained in Section 9 the statement that importations from the United States are dutiable under the provisions of the act (p. 7, Attorney-General's first brief).

4. That there followed a long correspondence between American merchants and the Secretary of War in regard to the tariff, and that the Secretary did not desire any promulgation of the tariff that had been determined upon before a decision of the Supreme Court in the Porto Rican cases (p. 8 of the first brief).

5. That those decisions were rendered May 27, 1901, and that a month after (June 28, 1901), there was sent a cable despatch by the Secretary of War to the Chairman of the Commission in the Philippines (pp. 8 and 9, first brief). It is stated (p. 8, of this first brief), that this telegram was sent as soon as the opinion was received and construed.

The telegram itself states (p. 9, Attorney-General's first brief):

> "The most obvious distinction between the status of Porto Rico and the Philippines after the cession, indicated in the opinions of the court, is in the fact that Porto Rico was at the time of cession in full peaceful possession, while a state of war continued in the Philippines."

From the decisions in the *Diamond Rings* case and in this case it is apparent that the Secretary of War misapprehended this honorable court in assuming it had indi-

cated the distinction referred to by him between the status of Porto Rico and the Philippines. His construction of the opinion of this court, however, could not under any circumstances be treated as a recognition of a continuing state of war in the Philippines after the war with Spain had terminated. Especially could it not be so considered in view of the care exercised by the administration in all its dealings with the insurrection to withhold from the insurgents any recognition of belligerency. The next sentence, however, of the Secretary of War's cablegram makes it plain that the President did not continue the imposition of duties because he construed the opinion of this court to have made a distinction between the status of Porto Rico and the Philippines, but for the very different reason, that the court had not as yet passed upon the status of the Philippines.

The President's reason for continuing the imposition of duties is thus stated:

> "As the question of the President's power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court, the President has determined to continue to impose duties as heretofore."

It is expressly stated that his power has not been decided by the courts. In the face of that statement, is it to be assumed that the President had decided to forestall the action of this court and to determine—what the Government's argument is in its last analysis—that his constitutional authority was only defined by his intentions? Not at all. The President, administering the affairs of the Government, and, as the Secretary of War states, hoping for further decisions shortly after the court met in October, did, pending these decisions decide upon a continuation of the *statu quo*. For this decision there was every reason; at that stage of affairs it was certainly the

wisest and best course open to him. By pursuing that course he would protect the Government, whose chief officer he was, and likewise those individual rights which it was not only Mr. McKinley's duty and privilege, but always his pleasure, to protect. Duties up to the time of the Porto Rican decisions had been collected on goods coming from the United States, both in Porto Rico and the Philippines. Suits had been brought for recovery in Porto Rico, and if not actually brought, would no doubt be brought for recovery in the Philippines. His powers to impose these duties in the Philippines, as he states, were yet undecided by the courts. Therefore, if he continued to levy those duties and the courts decided (as this court has finally done) in favor of recovery, the claimants would get back what they had paid, and their individual rights would not be lost but would be fully protected. If, on the other hand, he had in advance of action by the courts ordered the levying of these duties discontinued in the Philippines, and this court had sustained the right to collect those duties, then the duties to which the Government would have been entitled would, through the President's action, have been forever lost. The situation is one where, acting in an executive capacity, the Government was entitled to the benefit of any doubt, and the President could not, in the faithful discharge of his duty, have done less than he did. He, however, by his action, determined nothing more as to the status in the Philippines than the Secretary of War stated that he had determined, viz: that his power to impose these duties had not been decided by the courts. And the facts of this case do not support the argument, however adroitly it may be put, that President McKinley considered that by virtue of the authority vested in him as Commander-in-Chief he had a clear right to levy these duties.

6. The facts cited (p. 10, Attorney-General's first brief)

regarding the preparation of a tariff bill by the Philippine Commission and the putting of the same in force, need no consideration here, because the tariff did not go into effect until November 15, 1901, and all the duties here claimed for were levied prior to that time under the order of July 12, 1898.

7. The report of the Ways and Means Committee of the House of Representatives, adopted by the Senate, on the Philippine Tariff Bill, quoted from on page 11 of the Attorney-General's brief, would not, in view of the plain language of the act itself, be admissible to show the intention of Congress; but that report does not indicate an intention to ratify anything that might have been done by the President without authority as Commander-in-Chief. The report says:

> "It is intended to restore the status which existed prior to the late decision of the Supreme Court in the case of the *Diamond Rings*."

The language "restore the status" relates to the future, and suggests nothing retroactive in effect. It really precludes the idea that the bill was intended to be retroactive. If such effect was intended the Committee would not have stopped at merely referring to restoring a status.

Why Congress adopted the rates that had been established by the order of the Philippine Commission September, 1901, is explained in the following parts of the report not quoted in the Government's brief.

> "These different forms of tariff in force there have produced a surplus of revenue, after paying the expenses of the Government. * * * The necessity for the continuance of revenue which shall be both ample and certain is imperative. * * * The object of the bill is to meet a pressing emergency practically and efficiently. We present the tariff act of the Commission as the best that can be devised in the limited time left for us to act."

The bill as finally enacted clearly negatives the idea that it was to be retroactive. Congress states that the provisions of an act entitled

> "An Act to revise and amend the tariff laws of the Philippine Archipelago, enacted by the United States Philippine Commission on the 17th day of September, 1901, shall be and remain in full force and effect and there shall be levied, collected and paid upon all articles *coming into* the Philippine Archipelago from the United States, the rates of duty which are required by the said act to be levied, collected and paid upon like articles imported from foreign countries into said archipelago."

"Coming into the Philippine Archipelago" certainly relates to after the passage of the act and not to goods that had come in previously. The plain meaning of this provision is: That Congress determined to provide that for the future it would extend the same rate of duties to goods that came from the United States that were being properly levied in the Philippines on goods coming from foreign countries.

As stated by the Commission, it was the best rate that could be devised in the limited time left in which to act.

There is however a fact totally overlooked in the contention of the Government based upon this report of Congress and this clause of the bill, which is: The Act of the Philippine Commission, adopted by Congress and enacted by the Commission on the 17th day of September, 1901, did not by its terms go into effect until November 15, 1901. The duties included in these suits were none of them levied later than October 25, 1901. Therefore had Congress said in express terms that it ratified the levying of all duties under this Act of the 17th day of September, 1901, and its power to so ratify was unquestioned, it would not have affected this case, where the duties were levied under the order of July 12, 1898.

In the second brief of the Attorney-General the idea is abandoned that the act of March 8, 1902, the Philippine Tariff Act, ratified the levying of duties previous to the passage of the act. The brief says (the italics being our own):

> "The act of March 8, 1902, was the adoption by Congress itself, as its own tariff law for the Philippines, of the existing provisional tariff, without any change, and specifying that it applied to merchandise entering the Philippines from the United States. This statute altogether disposed for the future of the question of the validity of the taxation, and of course falls completely within the ruling of the insular cases respecting the constitutionality of the analogous law for Porto Rico—the Foraker Act. No reasonable mind could doubt that the fair and natural inference from this act is that Congress had followed the proceedings in the tariff field respecting the Philippines and approved what had been done, *although so far without specific ratification as to the past.*"
>
> Second brief of the Attorney-General, p. 5.

To refer now to the last brief of the Government.

Last Brief.

It is stated:

> "Then came the Spooner amendment in March, 1901, and whatever else may be pertinent to say about it, this much is certain—that it followed by substantial reproduction of language the precedent of the *Louisiana* case, Act of October 31, 1803, 2d Stat. 245; that there could not well be a broader amount of power giving the President all possible authority to cover every phase of the Philippine emergencies and necessities, and that the general intention of Congress at that time to approve comprehensively what the President had previousiy done, and to authorize him comprehensively to act thus in the future, appears too plain for any discussion."
>
> Pp. 4 and 5, second brief of Attorney-General.

Commencing on the middle of page 10 of our first brief, and extending to the middle of page 14, will be found a succinct discussion of the effect of the Spooner amendment upon duties levied in the Philippines; and to this the attention of the court is especially invited. Here it suffices to say that we differ with the Honorable Counsel for the Government, in the idea that that amendment followed by substantial reproduction of language the precedent of the *Louisiana* case, and we think the discussion just referred to in our first brief makes that plain. Furthermore, no action was taken by the President in the matter of levying duties under authority of the Spooner amendment. As shown on page 13 of our first brief, the President directed that until further orders the Government will continue under existing instructions and orders, and as also pointed out in our first brief, even the act of the Philippine Commission of September 17, 1901, which went into effect November 15, 1901, and under which none of the duties here claimed were levied, was not enacted under authority of this amendment.

In the second brief of the Government there are several references to and considerable discussion of the case of *Hamilton* v. *Dillin*, 21 Wall. 73. This court is fully familiar with that case, and it is only necessary to say that in the application made of it here counsel overlook the date of April 11, 1899, when the war with Spain ceased.

The license tax on cotton, recovery for which was sued for in that case, was levied during the Civil War, and is recognized throughout the case to have been levied as a war measure, and so far as authority was given the President by Congress to levy this license tax July 13, 1861, and so far as the regulations under which the levy was made, were recognized and confirmed July 2, 1864, both were acts of Congress passed during the war; one authorizing action by the President, which, as a war measure it was

perfectly proper to authorize, and the other recognizing and confirming the authorization.

Relative to the argument based upon this case of *Hamilton* v. *Dillin*, that there has been no proper protest in these cases: That argument is outside the two points to which the court has confined this re-hearing. It has nothing to do with ratification or the power to ratify but relates to the right to recover, regardless of and entirely independent of those two points, a subject not now open to discussion.

On pages 22 and 23 of the second brief of the Attorney-General it is said, referring to the claimants in these cases:

> "They shifted the burden placed on them to their customers, by adding the duties to the price for their merchandise; and now they are very willing to recover this amount again from the Government."

Considering the very high source from which this assertion comes, we are constrained to notice it and say that if it were correct we can see no effect whatever it could have upon the rights of the claimants to recover these duties. There is however nothing in the record to support such a statement.

The Government has submitted what it terms "a statement of claims filed" as showing the amount involved in this controversy. We are unable to comprehend the relation between amount involved and the principles of law governing a case; but, in regard to the claims we represent, we regret to have found, since filing our petitions, that what we claim in American gold was in reality paid in Mexican silver—which will reduce the claims over one-half. And counsel for other claimants tell us that they have made equally unfortunate discoveries.

H. A. HERBERT,
BENJ. MICOU.

October 9, 1905.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
OCT 17 1905
JAMES H. McKENNEY,
Clerk.

FREDERICK W. LINCOLN AND OTHERS,
Plaintiffs in Error,
against
THE UNITED STATES,
Defendant in Error.

No. 149.

WARNER, BARNES & CO., LIMITED,
Appellant,
against
THE UNITED STATES,
Appellee.

No. 466.

Brief for Plaintiffs in Error and for Appellant in Opposition to Petition for Rehearing.

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Supreme Court of the United States,

OCTOBER TERM, 1904.

FREDERIC W. LINCOLN ET AL., Plaintiffs in Error, vs. THE UNITED STATES.	No. 149.
WARNER, BARNES & CO., LIMITED, Appellant, vs. THE UNITED STATES.	No. 466.

Brief for plaintiffs in error and appellant, in opposition to the petition for rehearing.

The opinion of this Court in these cases was handed down April 3d, 1905, and is reported in 197 U. S., 419. On May 29, 1905, the Attorney-General having asked leave to file a petition for rehearing, this Court made the following order :

" MAY 29, 1905.

" No. 149, Frederic W. Lincoln *et al.* vs. U. S.
" No. 466, Warner Barnes & Co., Ltd., vs. U. S.
" Leave is given to file petitions for rehearing
" *addressed solely to the two points* whether Con-

" gress ratified the collection of the sums sought
" to be recovered in these suits, and whether it
" had power to do so; and the applications for
" rehearing will be taken as submitted by both
" sides on printed briefs on or before the first
" Monday of the next term."

Understanding as we do that all the other questions in the case are finally settled by the opinion and in view of the explicit language of the order, we shall not follow the counsel for the Government in their discussion of any questions other than the two above stated.

First.

NEITHER BY THE ACT OF JULY 2D, 1902, NOR BY ANY OTHER ACT HAS CONGRESS RATIFIED THE COLLECTION OF THE DUTIES INVOLVED IN THESE CASES, IMPOSED UPON MERCHANDISE BROUGHT FROM NEW YORK TO MANILA BETWEEN APRIL 11TH, 1899, AND OCTOBER 25TH, 1901.

(*a*) *The duties involved in these cases were all collected by military officers under the alleged authority of the order of July 12th, 1898, and the amendments thereof.*

This is found as a fact by the Court of Claims in the Warner Barnes case (Finding VI., p. 13).

(*b*) *This order of July 12th, 1898, did not authorize the collection of duties upon articles brought to Manila from the United States from the moment that the United States ceased to be a foreign country with respect to Manila.*

It is with the interpretation, not with the validity of this order that we are now concerned.

This order being substantially identical with the Porto Rican order construed by this Court in the first

Dooley case (182 U. S., 222) must, necessarily, receive the same construction.

The two orders are set out in full and their identity demonstrated in our original brief (pages 12, 13), and this Court has decided (197 U. S., 428) that this "was "an order intended to deal with imports from foreign "countries only and Philippine ports not in the actual "military control of the United States," or, as was said in the first Dooley case, 182 U. S., at 235:

> "Without questioning at all the original validity "of the order *imposing duties on goods from for-* "*eign countries*, we think the proper construction "of that order was that it ceased to apply to goods "imported from the United States from the mo- "ment that the United States ceased to be a for- "eign country with respect to Porto Rico, and "that until Congress otherwise constitutionally "directed, such merchandise was entitled to free "entry."

(c) *None of the so-called "amendments" changed this meaning of the order or authorized the collection of duties on imports from the United States after the treaty took effect.*

The learned counsel for the Government refer to several amendments to the order which, although referred to in the Government's original brief, they claim escaped the attention of the Court.

Only three of these require consideration. It is claimed by the Solicitor-General in his petition, page 13, that General Orders No. 10 of October 26, *1898*, applied to every vessel and every cargo and by exempting from duties and charges all material for the use of the United States, created a necessary inference that other merchandise from the United States was to be taxed. It is quite sufficient to say that under the opinion of this Court in the first Dooley case the order of July 12, 1898—which was not put in force until November 10th, 1898—did authorize the collection of duties upon imports from the United States as long as

the United States remained a foreign country with respect to Manila, that is until April 11, 1899. This amendment made in October, 1898, before even the signing of the treaty, does not tend to raise any inference at all as to the proper construction of the order after the treaty took effect.

The second so-called "amendment" is the President's order of December 21st, 1898, from which a short extract is made at page 5 of the petition. We shall consider it somewhat more fully.

This order recites that the destruction of the Spanish fleet and the reduction of the City of Manila and the surrender of the Spanish forces have practically effected the conquest of the islands and the *suspension of Spanish sovereignty* and that by the treaty of peace the future control and government of the islands are ceded to the United States. This cession it was stated, puts upon the country "responsible obligations of "government" and confers rights of sovereignty; and it is further stated that "the taxes and duties hereto-"fore payable by the inhabitants to the late govern-"ment became payable to the authorities of the "United States," and that "all ports and places in the "Philippine Islands in the actual possession of the "land and naval forces of the United States will be "open to the commerce of all friendly nations," and that "all goods, and wares not prohibited for military "reason by due announcement of the military authori-"ties *will be admitted upon payment of such duties and "other charges as shall be in force at the time of their "importation.*"

This order of the President of the 21st of December, 1898, we respectfully submit, so far from being a continuance of the order of July 12th, 1898, is a tacit admission that as a war measure in the language of this Court "that order expired by its own terms when the war with Spain was at an end," and that as a consequence the President provided for the establishment of a new order of things, based upon the rights of sovereignty and the cession of the islands which the order recites. As a consequence it provided for the

payment to the then sovereign, the United States, of all "taxes and duties heretofore payable by the inhabitants to the *late government;*" the new sovereignty accordingly declared all ports and places in the newly ceded possession "open to the commerce of all friendly nations." As the Treaty of Peace had not yet been ratified, the order prudently reserved the right to prohibit for military reasons the admission of certain goods and wares, and provided that all others should be admitted "upon payment of such duties and other charges *as shall be in force at the time of their importation*", *i. e.* upon payment of the usual and ordinary tariff duties applicable to all foreign merchandise imported into the country. The word "importation" as here used plainly meaning that only goods "imported" from countries foreign to the Philippines should be subject to duty.

In other words the President, anticipating by several months the ratification of the treaty and its legal effect, asserted the sovereignty of the United States in the Philippines, the extinction of the sovereignty of the late government and ceased to consider the United States as foreign to the Philippines, declaring it to be the "sovereign" of that territory and extending commercial hospitality to all friendly nations; surely this is no "amendment" or continuance of the order of July 12th, but a quite plain notification that the term during which "military contributions" had been enforced was at an end and that thereafter the usual taxes and duties imposed by law on importations from foreign countries should be paid to the United States.

This theory—so entirely in accord with the opinion of the Court in this case—is emphasized by the order of May 3d, 1899 (p. 3 of brief on present hearing, and page 5 of original Petition for rehearing), constituting the Philippine Archipelago and the Island of Guam into a collection district, making Manila "the chief port of entry," directing the assignment of an army officer as "collector" and establishing sub-ports of entry.

It seems clear to us that these two orders were am-

ple notice to the officials in the Philippines that upon the ratification of the treaty the order of July 12th, 1898, would no longer apply to importations from the United States, and that the collection of such duties would not be "in accordance with the provisions of said order and subsequent amendments."

(*d*) *The President had not the power to impose any duties upon imports from the United States after the eleventh of April, 1899, until the enactment of legislation to that end by Congress.*

We do not mean to discuss the power of the Philippine Commission to enact a tariff imposing duties on goods brought from the United States. That question is not involved in the cases now before the Court.

In the first Dooley case, 182 U. S., 222, at 236, this Court says :

> "In our opinion the *authority* of the President
> "as Commander-in-Chief to exact duties upon im-
> "ports from the United States *ceased* with the
> "ratification of the treaty of peace, and her right
> "to the free entry of goods from the ports of the
> "United States continued until *Congress* should
> "constitutionally *legislate* on the subject."

It is not to be assumed that the President intended to exceed his lawful authority or to extend the operation of his war order beyond the war period.

Under the decisions in the *Diamond Rings* and in the cases at bar there is no distinction between the power of the President to exact duties in Porto Rico and his power in Manila.

(*e*) *The collection of these duties by the authorities of the Government of the Philippines not being in accordance with the provisions of the order of July 12th, 1898, and its amendments, was not ratified by Congress.*

The only act of Congress upon which the counsel for the Government now rely is that of July 2d, 1902, §§ 1 and 2, quoted in full at pages 7, 8 and 9 of their last brief.

In construing any act of the national legislature, the intention of Congress is to be ascertained from the language used in the act under consideration, not from the opinions of individual members of Congress, and not by an assumption as to what must have been the intention of Congress (*Knowlton vs. Moore*, 178 U. S., 41). The Government assumes that this act ratified *everything that has been done* in the Philippines, including the collection of duties upon imports from the United States. The Government discusses the act as if it expressly stated that the collection of duties on imports from the United States during the period in question was thereby ratified and confirmed. This is not the language of the section of the act in question. On the contrary, the act purports to ratify not *every* act of the authorities *in collecting duties*, but only

> " the action of the President * * * *as set*
> " *forth in his order* of July 12th, 1898, whereby
> " a tariff of duties and taxes, *as set forth by said*
> " *order*, was to be * * * collected * * *
> " together with the subsequent amendments of
> " said order * * * and the action of the au-
> " thorities of the Government of the Philippine
> " Islands, *taken in accordance with the provisions*
> " *of said order.*"

This Court having a year before this act was passed construed the Porto Rican order as not applying to imports from the United States after April 11, 1899, and none of the amendments having changed the order in this particular it necessarily follows that the collection of duties on imports into Manila from New York after that date was not in accordance with the identical provisions of the Philippine order and was therefore not included within the ratification. The language of the act is not susceptible of any other construction.

No intendment outside of this plain language can be imported into the act from extraneous considerations. The intention to ratify an act which was unauthorized

by law must be clear and unequivocal. Freedom from governmental exactions is the normal condition and the subjection of a citizen to a tax will not be inferred but must be plainly asserted by the law-maker. This has been the rule of interpretation of revenue laws.

Hartranft vs. Wiegmann, 121 U. S., 609.
American Net & Twine Co. vs. Worthington, 141 U. S., 468.

The argument is also made that inasmuch as the Secretary of War directed that duties should be collected on imports from the United States, the construction he thereby put upon the order was the proper construction and the construction which Congress intended to ratify. With regard to this point, it is sufficient to say that the cablegram from the Secretary of War to the Governor of the Philippines, dated June 8th, 1901, ten days after the decision of this Court in the Porto Rican cases, which is quoted at pages 8 and 9 of the Attorney General's first brief on this petition shows simply this; that until the Diamond Rings case was decided, it was uncertain whether or not the decision in the first Dooley case applied to the situation in the Philippine Islands and that the Secretary of War therefore had resolved this doubt in favor of the Government. In his cablegram he says, "As the "question of the President's power to impose du- "ties in the Philippine Islands under the existing "conditions of military occupation has not been "decided by the court, the President has deter- "mined to continue to impose duties as hereto- "fore." The decision in the Diamond Rings case was not handed down until December, 1901, and on the 15th of November, 1901, the President's order of July, 1898, had been superseded by the Tariff Revision Law of the Philippine Commission so that the executive department did not, after the legal status of the Philippines had been passed upon by this Court, either modify the terms of the order or hold that its language embraced imports from the United States. It is the universal practice for the executive department to re-

solve all doubtful questions of this character in favor of the Government and then, in case of a mistake, the importer has a remedy by action. But had the Secretary of War in June, 1901, directed that no further duties should be collected in the Philippines on imports from the United States and had this Court decided the Diamond Rings case the other way, the Government could never have recovered duties on goods admitted free prior to the decision (see on this point Attorney General's second brief, pp. 31, 32).

The honorable Secretary was not acting judicially but admittedly taking an extreme position in the hope that it might be sustained by the Court. Therefore, the direction of the Secretary of War had no significance as an interpretation of the President's order, and can hardly be taken to have given any color to the language used by Congress in the act of ratification.

This Court has recently held that a hundred years of administrative construction are not conclusive.

Fairbank vs. U. S., 181 U. S., 283.

(*f.*) *The President, having in his capacity of Commander-in-Chief no authority to collect duties on imports from New York after the treaty took effect, the action of his subordinates in collecting such duties was not ratified by this act.*

The act is drawn with remarkable care and Congress expressly did *not* ratify any illegal action on the part of the President or any of his subordinates. On the contrary it is only the action taken by the President "*by virtue of the authority vested in him as Commander-in-chief of the Army and Navy*, as set forth in his "order of July 12th, 1899, and the actions of the authorities of the government of the Philippine Islands, "taken in accordance with the provisions of said "order and subsequent amendments," which are ratified. This act does not purport to give to the President of the United States any power or authority

which he would not have had without it (assuming for argument that Congress can increase the power vested in the President by the Constitution). It is simply a ratification by Congress of such action taken by the President as he had power to take "*by virtue of the authority vested in him as Commander-in-chief*". How, then, is this authority vested in the President? By the Constitution of the United States and by that alone. His power is stated and defined by that instrument. By whom are the extent and limitations of this power to be decided when they are involved in an action at law? By Congress, or by the President himself, or by this Court? Indisputably by this Court. And this Court in the first Dooley case had at the time of the passage of this act already defined the extent and limitations of the power of the President in imposing a tariff of customs duties in the Island of Porto Rico.

It is further to be noted, from the documents submitted by the Government, that the Executive Department had long entertained serious doubts as to whether the order of July, 1898 applied to imports from the United States after the ratification of the treaty. In fact, we find that on December 29th, 1900, immediately after the argument of the Diamond Rings case, the Philippine Commission prepared and forwarded to the Secretary of War a new proposed tariff bill which *expressly* imposed duties upon importations from the United States (see Attorney General's first brief on petition, page 7). The natural inference is that the tariff then in effect did not impose such duties.

Moreover, Congress, far from believing that either the President's order of July 12, 1898, or even the tariff enacted by the Philippine Commission, authorized the imposition of duties on imports from the United States, as urged by the Attorney General in his brief filed with the petition, pages 11, 12, had such serious doubts upon the subject that, in the Act of March 8, 1902 (32 Stat., 54), it followed the provision that the tariff enacted by the Philippine Com-

mission should "*be and remain* in full force and effect," with an express enactment reading :

> " *and* there shall be levied, collected, and paid
> " upon all articles coming into the Philippine
> " Archipelago from the United States, the rates
> " of duty which are *required by the said Act* to be
> " levied, collected, and paid upon like articles *im-*
> " *ported from foreign* countries into said archi-
> " pelago."

A quite unnecessary enactment if the tariff enacted by the Commission had imposed duties upon American imports. We deduce from the language used by Congress in this act directly the opposite conclusion from that deduced by the Attorney-General. To our mind it is clear that Congress did not consider that either the order of July 12, 1898, or the act of the Philippine Commission, authorized the imposition of duties upon goods brought into Manila from the United States.

Note, in passing, the technical accuracy of the language used by Congress in this act, in distinguishing between

> " articles *coming into* the Philippine Archipelago
> " from the United States " and " articles *imported*
> " from foreign countries."

Evidently both Congress and the President had the decisions of this Court in the insular cases in mind.

Congress is conclusively presumed to know the decisions of this Court ; so in this case it must be conclusively presumed that the language used in this act was intended to conform to the decision of this Court defining the authority which the President has as Commander-in-Chief. And since this Court decided in the first Dooley case that the authority vested in the President as Commander-in-Chief does not extend to the imposition of duties on imports from the United States, the interpretation of this act must necessarily be that Congress did not intend to and did not ratify any-

thing done by the President outside of, or in excess of, his authority. The collection of these duties was in excess of that authority, and therefore was not ratified.

It is urged that it cannot have been the intention of Congress to ratify

> " the President's action only so far as taken by
> " virtue of his *undoubted* authority as Commander-
> " in-Chief "

and to approve

> " only those proceedings and doings of his sub-
> " ordinate officers which were in *unquestioned* ac-
> " cordance with the provisions of the order"
> (Atty. Gen's. last brief, p. 6).

So expressed this argument sounds plausible. Let us however by paraphrasing it see how the proposition sounds for which the Government in now contending:

> " It was the intention of Congress to ratify
> " action taken by the President for which he had
> " no authority and Congress approved proceedings
> " and doings of his subordinate officers which were
> " without warrant of law and not in accordance
> " with the provisions of the order."

In other words, the ratification of " accordance " is the ratification of " discordance."

Is it to be supposed for a moment that if Congress had intended to approve the illegal and unwarranted seizure of the claimants' property by the subordinate military officers unsanctioned even by any order of the President—and that is what the exactions complained of were under the decision of the Court in this case in the respects unaffected by the pending application—it would have stated explicitly that it approved " the action of the authorities of the Government of the Philippine Islands *taken in accordance with the provisions of said order* and subsequent amendments ; " that if it intended to

ratify action of the President taken *outside of and beyond* the authority vested in him as Commander-in-Chief and *not* as set forth in his order of July 12, 1898, it would have stated explicitly that the

> "action of the President—*taken by virtue of the*
> "*authority* vested in him as Commander-in-Chief
> "of the Army and Navy *as set forth in the order* of
> "July 12th, 1898, whereby a tariff of duties was
> "to be levied and collected—together with the
> "subsequent amendments of said order are
> "hereby approved, ratified and confirmed."

If Congress had intended to ratify the collection of the duties on imports from the United States, it would have said so and not said the contrary.

But, it is urged, this ratification in the Act of July 2, 1902 is meaningless, unless it extends to the duties collected on imports from the United States after April 11, 1899, for the action of the President in ordering the collection of duties on imports from foreign countries before and after April 11th, 1899, and from the United States before that date was undoubtedly within his power, and the collection of such duties by the military subordinates was undoubtedly in accordance with the provisions of the order. Therefore, it is said, this action of the President and of his subordinates needed no ratification, and as said by the Attorney-General, page 6:

> "all those actions * * * were unquestionably valid without ratification by Congress under established principles of public law."

This argument has a certain speciousness; but it could be applied with equal or even greater force to many other acts of Congress ratifying actions of the Executive or of subordinate legistative bodies. See *Cross vs. Harrison*, 16 How., 164, where the Court having held that the duties were lawfully collected, refers at page 201, to acts of Congress ratifying all that

had been done by the military officers. Again and again Congress out of abundant caution ratifies that which needs no ratification and approves acts of the Executive which need no approval. Such legislation is usual and commendable. It tends to set at rest any questions which might arise and prevents the time of the courts being wasted with unnecessary inquiries.

But the ratification act as construed by the Court in this case and by ourselves is not by any means unnecessary or meaningless. The duties were originally collected under the order of July 12, 1898, as a military contribution while the war with Spain was in progress. Upon the transfer of sovereignty over the Philippines by the treaty signed on December 10th, 1898, the President on December 21, 1898, issued an order proclaiming the sovereignty of the United States in the Islands and directing that duties and taxes be collected for the future under existing laws not as a military contribution but as public revenues for the support of the government. When the treaty was ratified the order in so far as it was a military measure became *functus officio*, but the Philippines becoming thereby domestic territory of the United States, all applicable laws of the United States immediately became operative and it became the duty of the President not as Commander-in-Chief but as the Executive to put such laws in force and to establish a *de facto* civil government, administered as a matter of convenience if not of necessity by military officers. We can safely say that under the decision in *Cross vs. Harrison*, he would have been fully justified in putting the tariff laws of the United States into operation in the Philippines with respect to all importations from foreign countries. Instead of doing this he continued in force the tariff created by his order of July 12th, 1898, and established a collection district by the order of April 21, 1899, and made Manila the chief port of entry. The authorities of the Philippine Government collected duties under the provisions of these orders. The rates of duties established by the order of July 12, 1898 were quite different from those es-

tablished by the tariff laws of the United States, but as they were in every instance less, the merchants have no right to complain. A question however might well have been raised as to whether after April 11th, 1899, the President was justified in enforcing any tariff other than that sanctioned by an act of Congress. His power to do so was not directly involved in any of the Insular Cases and has never been squarely passed upon by this Court. We submit that it was to put this question at rest that Congress ratified the President's action. It may have been unnecessary. It was not meaningless.

Second.

CONGRESS HAD NOT THE POWER TO LEGALIZE THE COLLECTION OF DUTIES ON MERCHANDISE NOT SUBJECT TO DUTY AT THE TIME OF THEIR IMPORTATION.

Congress can only legalize and ratify an act which it has itself the power and authority to do and the power to do the act sought to be legalized must exist in Congress at the time of the ratification. The act must be presently—at the time of the curative act—within the scope of legislative authority.

> " It (the Legislature) could not ratify an act " previously done, *if at the date it professed to do so* " *it could not confer power to do it in the first in-* " *stance.*"
>
> *Grenada County vs. Brogden*, 112 U. S., 261, 271.

> " The exercise of the power implies legislative " authority over the subject as well at the time of " the curative statute as at the time of the enabling " statute. Legislative jurisdiction of the subject is " equally essential at both times ; both statutes

> " resting on the present authority of the legisla-
> " ture to authorize the proceeding and to pre-
> " scribe its details. Surely a statute could not
> " authorize a new proceeding or sanction an old
> " one in a matter presently without the scope of
> " legislative authority. We know of no excep-
> " tion to the rule that the power to do a thing
> " or to authorize it to be done *nunc pro tunc* im-
> " plies present right."
>
> *Kimball vs. Town of Rosedale*, 42 Wis., 413.

The act of ratification according to the interpretation claimed by the Government legalizes the imposition of duties upon articles of merchandise which at the time of their importation were not subject to duties. It fastens upon them an imposition from which they were exempt at the time they were brought into the country.

Had Congress in July, 1902, the power to impose duties upon importations already made, which at the time of importation were entitled to free entry? Certainly not, yet this is precisely the effect of the interpretation contended for.

Had Congress, in other words, the power to pass in July, 1902, an act of this purport :

> " All importations heretofore made into the
> " United States from the Philippine Islands and
> " into the Philippine Islands from the United
> " States, entitled to free entry under the law in
> " force at the time of their importation and ad-
> " mitted without the payment of duty, shall, never-
> " theless, be subjected to the payment of duties at
> " the following rates, to wit: etc." ?

The statement of the proposition we confidently submit is its own complete refutation, and yet there can be no doubt that the power to make retroactive laws legalizing the collection of duties for five years past, enforced under color of office at the time when the laws authorized no such collection, is in no way

distinguishable from the power to enforce the collection of duties retroactively imposed upon such merchandise as may have entered the country free of duty.

Third.

THE PETITION FOR A REHEARING SHOULD BE DENIED.

October 16, 1905.

PAUL FULLER,
FREDERIC R. COUDERT,
HENRY M. WARD,
Counsel for Plaintiffs in Error and Appellant.

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Supreme Court of the United States.

Office Supreme Court U. S.
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Clerk.

Nos. 149 and 466.

OCTOBER TERM, 1904.

No. 149.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE and CHARLES D. BARRY, trading as co-partners under the firm name and style of Henry W. Peabody & Co.,
Plaintiffs in Error,

vs.

THE UNITED STATES.

No. 466.

WARNER, BARNES & COMPANY, LIMITED,
Appellant,

vs.

THE UNITED STATES.

BRIEF ON REHEARING FOR PLAINTIFFS IN ERROR AND APPELLANT.

PAUL FULLER,
FREDERIC R. COUDERT,
Counsel for Plaintiffs in Error and Appellant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

Nos. 149 and 466.—October Term, 1904.

No. 149. Frederick W. Lincoln, Henry W. Peabody, John R. Bradlee and Charles D. Barry, trading as co-partners under the firm name and style of Henry W. Peabody & Co., Plaintiffs in Error, *vs.* The United States.	In Error to the District Court of the United States for the Southern District of New York.
No. 466. Warner, Barnes and Company, Limited, Appellant, *vs.* The United States.	Appeal from the Court of Claims.

The re-hearing ordered by this Court upon petition of the Attorney General is confined to the effect of the Act of Congress of July, 1902, upon the illegal exaction of duties from the complainants in these cases.

It is the law of these cases that the moneys exacted from the complainants were illegally exacted, and that such moneys belong to them.

That question is no longer open to argument. The Insular cases establish the proposition. Those cases are now the law of the land (Dorr vs. U. S., 195 U. S., p. 138; Rassmussen vs. U. S., 197 U. S., p. 516; Czarnikow vs. Bidwell, 191 U. S., 559). It is laid down in the opinion of the Court in the present case, and no re-hearing has been permitted with reference to it.

The moneys being then the property of the complainants wrongfully in the possession of the United States, the ques-

tion is: Has this ownership been divested by the Act of July, 1902.

To this question we answer:

I. Congress has no power to divest the complainants of their ownership or to deprive them of their property in the moneys exacted from them, and

II. Congress had no intention to do so by the Act of July, 1902.

I.

The Power of Congress.

The Constitution of the United States provides in the Fifth Amendment

> "that no person * * * shall be deprived of life,
> "liberty or property without due process of law, nor
> "shall private property be taken for public use without
> "just compensation."

A. The moneys were concededly the property of the complainants; they were illegally taken from them; an action was pending in the Courts to recover them. Any Act of Congress which in effect changed the ownership of the moneys and declared the taking, which the Courts held illegal, to be legal, and competent to transfer the title from the individual to the Government, is manifestly one depriving the citizen of his property without due process of law.

> "If this constitutional provision is a sufficient
> "authority," says this Court in *U. S. v. Lee* (106 U. S., at p. 218), "for the court to interfere to rescue a pris-
> "oner from the hands of those holding him under the
> "asserted authority of the Government, what reason is
> "there that the same courts shall not give remedy to

> " the citizen whose property has been seized without
> " due process of law, and devoted to public use with-
> " out just compensation. * * *

(And at p. 219):

> " It is not pretended * * * that the President
> " had any lawful authority to do this [seize plaintiff's
> " estate] or that the legislative body could give him
> " any such authority except upon payment of just com-
> " pensation."

Yet that is exactly what the Government counsel here " pretend."

B. Apart from the right of the complainants to protect their ownership of the moneys as against the United States and to bring suit for recovery—which is the case at bar—it is the settled law of this Court that complainants had a right of recovery against the officer or agent of the Government who made the illegal exaction.

Such was the recovery in DeLima vs. Bidwell (182 U. S., at p. 199).

> " Plaintiffs sue in assumpsit for money which the
> " collector has in his hands, justly and equitably belong-
> " ing to them. To say that Congress could by a subse-
> " quent act deprive them of the right to prosecute this
> " action, would be beyond its power."

This right of recovery, or right of action against the official who makes the exaction or commits the trespass, is recognized in a long line of cases.

Little vs. Barreme, 2 Cr., 170.
Meigs vs. McClung's Lessee, 9 Cr., 11.
Osborn vs. Bank of U. S., 9 Wheat., 738.
Grisar vs. McDowell, 6 Wall., 363.
Bates vs. Clark, 95 U. S., 204.
U. S. vs. Lee, 106 U. S , 196.
Virginia Coupon Cases, 114 U. S., 270.
In re Ayers, 123 U. S., 443.
McGahey vs. Virginia, 135 U. S., 662.
Belknap vs. Schild, 161 U. S., 10.

Such a right of action constitutes property in the same

sense as tangible things and is equally entitled to protection against arbitrary interference or legislative impairment.

Cooley Const. Lim., Sixth Ed., p. 443.
Sutherland Stat. Const., §§ 164, 206.
S. S. Co. vs. Joliffe, 2 Wall., 450, at pp. 457, 458.
Angle vs. Chic. St. P. &c. Ry., 151 U. S., 1, 19.

It has even been held that the denial of a remedy, or the imposition of new conditions or restrictions upon its exercise, is such an interference.

Bronson vs. Kinzie, 1 How., 311, 317.
Barnitz vs. Beverly, 163 U. S., 118, and cases there collated.

If the Act of July, 1902, makes legal the act of the Collector which was illegal at the time it was done, then complainant is deprived of his right of action—of his property—without due process of law, for the act of Congress would be a good defense in an action against the Collector.

> " To hold that Congress intended by this amenda-
> " tory statute to take away that right of action, is to
> " hold that it intended by a retrospective statute to de-
> " stroy a vested right of property or an existing right
> " of action."
>
> Auffm'ordt vs. Rasin, 102 U. S., 622.

> " If, as we assume, the money so taken by the de-
> " fendant illegally from the plaintiff was the money of
> " the plaintiff in the hands of the defendant, which by
> " the principles of the common law he had a *vested*
> " *right* to recover, it was not competent for Congress
> " by subsequent legislation to exclude the plaintiff from
> " his right to apply to the Supreme Court of this State
> " [of which the parties were both citizens] for its re-
> " covery or limit the time within which he should bring
> " such action " (p. 576).
>
> Hubbard vs. Brainard, 35 Conn., 563.

For this reason, that Congress cannot divest rights of property by arbitrary interference, the limitation upon retrospective or retroactive legislation has always been that it must not interfere with intervening rights.

Fleckner vs. Bank U. S., 8 Wheat., 338, 363.

> " Upon principle, every statute, which takes away or
> " impairs vested rights acquired under existing laws, or
> " creates a new obligation, imposes a new duty, or at-
> " taches a new disability, in respect to transactions or

"considerations already past, must be deemed retro-
"spective."

Per STORY, J., in Society vs, Wheeler, 22 Fed. Cases, 756, at p. 767.

Approved in Sturgis vs. Carter, 114 U. S., at p. 519.

The books are full of cases in which original assessments of taxes, issues of bonds by municipal authorities and other like actions, defectively carried out or impaired by irregularity, have been confirmed, ratified and made good by legislative action.

All these cases, it will be seen upon inspection, have reference purely to the *methods* of action employed, and relate to statutes curative only of defects in the *procedure* by which *an undoubted power* has been exercised. As tersely stated by the New York Court of Appeals (RAPALLO, J.), in referring to a legislative validation of an assessment made without the prescribed requisites:

"Though it should be held to validate the assess-
"ments, it could only render them operative from the
"time of its passage, for it must be upheld, if at all, as
"an exercise of the power of taxation whereby the leg-
"islature adopted the apportionment and assessment
"previously made, and imposed the tax directly upon
"the property affected in accordance with such previous
"assessment."

Lennon vs. The Mayor, 55 N. Y., at p. 367.

No cases will be found where in the absence of any *fundamental power* the action complained of has been made good by any subsequent ratification. This is the dividing line which limits the power of ratification.

The proposition here stated is best demonstrated by a quotation from the opinion of Mr. Justice PECKHAM in the case of

Cromwell vs. MacLean, 123 N. Y., 474.

There the Court considered the validity of an act of the legislature confirming sales of lands for the non-payment of taxes theretofore made under a previous act, which sales were invalid because made under an assessment, void for lack of notice to the taxpayer, and held the law unconstitutional as depriving persons of property without due process of law. The Court, per PECKHAM, Judge, there said (at page 489):

" Holding, as we must, that no title or interest in fact " passed to the purchaser at these tax sales, and that the " original owner, therefore, still retained his title, the " effect of the act in question, if valid, is by legislative " fiat to transfer the title of the property of Edward C. " Wilson, as trustee, to the lessees under these invalid " leases. * * * *Has the legislature of this state the right* " *to take the property of A and transfer it to B under the* " *guise of confirming sales made of such land in invitum,* " *but by which no title, in fact or in law, passed from the* " *owner to the purchaser?* The statement of the ques- " tion should be its best answer. Property thus taken " is not taken by due process of law.

" This is not a case within the principle that per- " sons who take conveyances of land by deed, or under " legal proceedings which lack validity by reason of " some omission or informality, take a title or right " subject to the power of the legislature to cure such " errors or defects by acts of retrospective legislation. " Where the proceeding is wholly *in invitum and the* " *defect of such a nature that no title has passed*, the " legislature cannot validate or legalize the proceed- " ing to the extent of itself conveying the title under the " form of confirming a sale under which no title passed. " (See remarks of BIGELOW, Ch. J., in Denny v. Mattoon, " 2 Allen [Mass.], 361, at 382, 383). * * *

" But where the proceedings are so contrary to the " provisions of the statute as to result in no valid assess- " ment whatever, and where the sales made under such " valid assessment convey no title or interest in the " premises to the purchaser, and the original owner has " the same title or interest in his property that he ever " had, there is no principle upon which to base the " power of the legislature under our Constitution by " any legislative act to transfer to the purchaser the " title to the property of the original owner, which such " purchaser would have had if all the proceedings up to " and including the sales had been valid. * * *

" *What difference does it make to say that the legis-* " *lature is acting only in the way of validating pro-* " *ceedings to collect a tax which in justice the owner of the* " *land ought to pay? The answer is that the proceedings* " *have been so fatally defective that no title has passed,* " *and the owner has his title to his property the same as* " *if no tax proceedings had been taken. Where is* " *the authority in such case for the legislature to itself* " *transfer the title to his property to some one else?* If " it be proper that he should pay the tax, the legislature " might itself tax him, giving him opportunity to be

"heard in some way before he must pay, as to the "amount for which he was liable, * * * or it could pro- "vide for further proceedings in order that a legal tax "might be levied, *but by no form of words could it* "*legally transfer the title of the owner to his property* "*to some third person*" (p. 491).

Is not this case precisely analogous to that at bar?

In each a void assessment was attempted to be confirmed by Legislative Act. The sole difference is that in the present case the property, taken without authority under guise of a tax, was money, while in the *Cromwell* case it was land. It has never been pretended (heretofore) that the Constitutional guarantees against expropriation are less applicable to one kind of property than to another.

C. UNLESS CONGRESS COULD IN JULY, 1902, ITSELF IMPOSE THE TAX COMPLAINED OF, IT COULD NOT BY RATIFICATION LEGALIZE ITS UNAUTHORIZED EXACTION.

Congress cannot by its ratification legalize the unlawful act of the Collector in exacting duties from complainants, unless at the time of such ratification it is itself vested with the power to do the act which it assumes to legalize,—unless in other words it may itself at such time lawfully do the very thing complained of.

Congress could not in July, 1902, collect moneys as customs duties from persons who had imported goods in 1899, at a time when the importations were not subject to such duties.

"It [the Legislature], could not ratify an act pre- "viously done, *if at the date it professed to do so*, it "could not confer power to do so in the first instance."
Grenada Co. Supervisors vs. Brogden, 112 U. S., at p. 271.

"To ratify is to give validity to the act of another "and implies that the person or body ratifying *has at* "*the time power to do the act ratified.*"
Norton vs. Shelby Co., 118 U. S., at p. 451.

The power to do the act sought to be legalized must exist in Congress at the time of the ratification. The act must be presently, at the time, as a curative act within the scope of legislative authority.
Kimball vs. Town of Rosedale, 42 Wis., 413.

The question, therefore, is whether in July, 1902, Congress could do what the effect of ratification would operate in the present case?

At the time of the introduction into Manila of the goods involved in this case, it was the right of the claimants, under the then existing law, to ship goods from New York to Manila, without paying any duties or penalties of any character. This was a vested right as the law then stood. It was the right to trade untrammeled by any exactions not legally upon the statute books.

The power of Congress is limited in the levying of duties, to a tax upon the importation of merchandise; but if merchandise has been imported in accordance with existing law and is mingled with the property of the country, Congress has no authority to levy duties upon it.

Could Congress by a retroactive or retrospective law, when the importation had been made under the sanction of existing law, impose a duty or penalty or tax upon goods previously imported into the country? And if Congress could not impose an import duty upon goods already lawfully brought within the country, how can it, by a ratification of a collector's unlawful exaction, accomplish the same end?

This would be to deprive the citizen of property without due process of law.

For instance, if to-day the Collector of New York should exact the payment of duties on importation of articles placed upon the free list by the Tariff Law, could Congress thereafter, by a retroactive act of ratification, make such collection legal?

If the President were to-day to issue an order to all collectors in the United States to collect duties at 100 per cent. advance on those imposed by the Tariff Law, could Congress, by a subsequent act of ratification, legalize such an unlawful assumption of power?

II.

The Intention of Congress.

Congress did not intend to legalize the collection of duties which this Court had decided to have been unlawfully exacted.

I. If such was the purpose of Congress it could have been expressed in language of the utmost simplicity.

It was not so expressed.

Nothing could have been easier for Congress to say than: All collections of duties upon shipments from the United States to the Philippine Islands prior to the passage of this Act are hereby ratified, confirmed and legalized.

II. The Government urges that the Court may infer such a purpose from language which is at the best uncertain and ambiguous.

(*a*) Such an inference would be contrary to the rule adopted in reference to all impositions of taxes or burdens upon the citizen,—the rule being that no burden will be imposed unless unequivocally laid down.

Duties are never imposed upon vague or doubtful interpretations and where a question of classification is one of doubt, the doubt will be resolved in favor of the citizen,—the requirement being that any intention of Congress to impose a higher duty must be expressed in clear and unambiguous language.

Hartranft vs. Wiegmann, 121 U. S., 609.
Am. Net & T. Co. vs. Worthington, 141 U. S., 468.

(*b*) Such an inference would be contrary to the sound and unassailable presumption that the Government is always willing to fulfill its obligations, pay its debts and do complete justice.

> "It is as much the duty of the Government as of "individuals to fulfill its obligations."
> U. S. vs. Klein, 13 Wall., p. 144.

> "The supposition that the Government will not pay "its debts, or will not do justice, is not to be indulged."
> Gibbons vs. U. S., 8 Wall., 269, at p. 274.

> " The land is certainly the property of the plaintiff " below, and the United States cannot have intended to " to deprive him of it, by violence, and without com- " pensation."
>
> Meigs vs. McClung's Lessee, 9 Cr. 11.

Is personal property any less sacred than land?

(c) Such an inference would be contrary to the intent of Congress as shown in contemporary acts which authorized the refunding to citizens of duties unadvisedly collected on shipments to and from Porto Rico and from the Philippines.

> *Act of April 29, 1902*, U. S. Stat. Vol. 32, part I, p. 176, refunding with interest duties collected in Porto Rico, for which no action had been brought.
>
> *Act of March 3, 1903*, U. S. Stat. Vol. 32, part I, p. 1224, refunding duties paid without protest on shipments from Porto Rico and the Philippines, unlawfully exacted, but as to which the defence of voluntary payment was available to the United States.
>
> *Act of March 3, 1905*, U. S. Stat. Vol. 33, part I, p. 1013, extending time to bring suits under Act of April 29, 1902.

These acts demonstrate the settled policy of Congress to conform to the interpretation of the law as laid down by this Court and facilitate the recovery of duties illegally exacted as soon as this Court has adjudged them illegal. There has been as yet no such act in regard to duties on imports into the Philippines, because, until the decision of the cases at bar, the legality of such duties was still *sub judice*.

> "As the Courts will not interfere with the action of the " legislature, so it may rightfully be presumed that the legisla- " ture never intends to interfere with the action of the Courts " or assume judicial functions to itself."
>
> Brewer, J., in Angle vs. Chicago & St. Paul Railway, 151 U. S., at p. 20.

(d) Finally, such an inference would assume that Congress intended to ignore the prohibitions of the Fifth Amendment to the Constitution and to deprive the citizen of his property without due process of law, and to take his property for public use without compensation. If such an inference could be drawn it would invalidate the Act, and this the Court will not

do unless the language of the statute is so plain as to leave no room for construction (see cases collected in 190 U. S., 214).

> "Our duty, therefore, is to adopt that construction "which, without doing violence to the fair meaning of "the words used, brings the statute into harmony with "the provisions of the Constitution. * * * And "such is the rule recognized by the Supreme Court of "Mississippi in *Marshall v. Grimes*, 41 Miss., 27, 31, in "which it was said: 'General words in the act should "'not be so construed as to give an effect to it beyond "'the legislative power, and thereby render the act un-"'constitutional. But, if possible, a construction "'should be given to it that will render it free from "'constitutional objection, and the presumption must "'be that the legislature intended to grant such rights "'as were legitimately within its power.' Again, in "*Sykes v. Mayor, &c.*, 55 Mississippi, 115, 143: 'It "'ought never to be assumed that the law-making de-"'partment of the government intended to usurp or "'assume power prohibited to it. And such construc-"'tion (if the words will admit of it) ought to be put "'on its legislation as will make it consistent with the "'supreme law.'"
>
> Grenada Co. Supervisors vs. Brogden, 112 U. S., p. 269.

III. If, however, the Court were at liberty to search the language of the Statute for possible inferences and interpretations upon which to uphold the imposition of a burden not expressed in plain terms, no such inference can reasonably be drawn.

The act purports to ratify not *every* act of the authorities *in collecting duties*, but only

> "the action of the President * * * *as set forth in* "*his order* of July 12th, 1898, whereby a tariff of du-"ties and taxes, *as set forth by said order*, was to be "* * * collected * * * together with the sub-"sequent amendments of said order * * * and "the action of the authorities of the Government of "the Philippine Islands, *taken in accordance with the* "*provisions of said order* and subsequent amendments."

This Court has already held in the Dooley case, 182 U. S., at p. 235, that the "proper construction" of that order is that it ceased to apply to goods imported from the United States

from the moment the United States ceased to be a foreign country with respect to the Insular possessions, and as a consequence of this construction of the order, this Court held that the order itself did not authorize the collection of duties after the ratification of the treaty of peace. It must of necessity follow that an act of Congress ratifying what was done in pursuance of that order does not reach the collection of duties by subordinate authorities after the date of ratification. The order, this Court has said, did not contemplate or authorize such collection ; if it had it would have been void *pro tanto* as exceeding the power of the President.

In the case at bar (197 U. S., p. 428) this construction of the order is confirmed :

> " It plainly was an order intended to deal with im-
> " ports from foreign countries only and Philippine
> " ports not in the actual military control of the United
> " States."

It is urged, however, that, accepting this construction of the order, and admitting that it was inapplicable to shipments between the United States and the Philippines after the Treaty of Cession, yet subsequent amendments were applicable to such shipments. These so-called amendments or subsequents orders are of two categories :—those made by the President, and those made by subordinates, either military officers, or the Military Governor of the Philippines. Those of the latter category we will not discuss, as it is obvious that subordinates cannot amend an order of their Chief, and moreover they dealt with regulations and schedules and like incidents of a minor character.

With reference to any supposed Presidential amendments to the war order of July 12, 1898, we would first call attention to the statement in the Government's final brief upon petition for re-hearing :

> " The President, during the War emergencies, di-
> " rected his officers to act in a certain way, to collect
> " duties under a provisional tariff. If his orders to
> " that effect, before the Treaty, were technically legis-
> " lation, that was valid legislation beyond question and
> " needed no ratification from Congress. These orders
> " fell, let us say, as valid legislation on April 11, 1899,

" *but the President continued to do the things prescribed,* " without immediate authority. *He did not legislate ;* " he did not re-establish former legislation ; he simply " acted and continued to act." * * * (pp. 13, 14).

According to this view, the subsequent orders were merely carrying out " *the thing prescribed* " in the original order of the President, and operated no change in the construction or operation of such order ; they were " in accordance " with the original order, and were ratified by Congress as being " in accordance " therewith.

The question then presents itself, whether as the Government contends, the President by these subsequent orders " continued to do the thing prescribed " by his former order—his former legislation.

The thing prescribed by the original order, as twice held by this Court, was the collection of duties on imports from foreign countries, and so far as the President continued to do this, after the ratification of the treaty, the action was in accordance with the " thing prescribed " and was within the terms of the ratification. But the first mistake into which the Government has fallen, is to assume that because that valid military legislation of the President continued as valid legislation after the treaty of cession, it applied after such cession to anything but foreign countries.

These subsequent " acts " were not alterations of the President's order. The purpose of that order was to impose customs duties on commercial intercourse between the Philippines and foreign countries ; the misapplication of the order continued by the amendments, was to enforce its tariff schedules against American commerce with the Philippines after they had become domestic, under the erroneous impression that the insurrection made the Philippines foreign, an error only dispelled by the decision of the Fourteen Diamond Rings (183 U. S., 176).

This is attested by Secretary Root's dispatch (p. 8 Brief Atty. Genl. on Petition for Rehearing) as follows :

" The most obvious distinction between the status of Porto " Rico and the Philippines after the cession, indicated in the " opinion of the Court, is in the fact that Porto Rico was at " the time of cession in free peaceable possession, while a state " of war has continued in the Philippines."

Thus the Administration itself held the view that the order of July, 1898, applied to foreign countries, and only applied it to the United States in the belief that the existence of the insurrection suspended the operation of the Treaty as a nationalization of the Archipelago.

Moreover there is serious doubt whether this War legislation, so far as it imposed duties on importations into the Philippines after the Treaty of Cession, different from the rate of duties which Congress had imposed upon importations from foreign countries, *was* valid legislation.

The solicitor general thus describes the action taken:

> " It must be remembered that the Philippine tariff
> " did not apply the Dingley schedules to foreign coun-
> " tries. Our military authorities, continuing Spanish
> " rates for that oriental locality, after discontinuing the
> " preferences to Spain, taxed with a view to local needs.
> " They admitted free what we tax, or they taxed lightly
> " what we tax heavily." (Add. brief for appellee, p. 7.)

Under the decisions of this Court in *Cross vs. Harrison* (16 How., 164) and *Dooley vs. U. S.* (182 U. S., 222), it was the duty of the President under his obligation to enforce the laws of the United States, to put in operation in the Philippine Islands after the Treaty of Cession the duties prescribed by the Tariff laws of the United States.

In Dooley vs. U. S., 182 U. S., at p. 232 (as well as in De Lima vs. Bidwell, 182 U. S., p. 184 *et seq.*), the Court adverts to the decision in Cross vs. Harrison as holding:

> " that the right of the military commander to exact
> " the duties prescribed *by the tariff laws of the United*
> " *States* continued until a collector of customs had been
> " appointed."

And also:

> " That the war tariff, however, was abandoned as soon
> " as the Military Governor had received from Wash-
> " ington information of the exchange and ratification of
> " the treaty with Mexico, and duties were afterwards
> " levied in conformity with such as Congress had im-
> " posed upon foreign merchandise imported into other
> " ports of the United States, Upper California having
> " been ceded by the treaty to the United States."

But, conceding for the sake of the argument that these decisions left in doubt the question whether the Tariff Laws of the United States in force at the time of cession applied immediately upon the cession to the newly-ceded territory, the existence of such a doubt would be ample reason for Congress to ratify the various acts of the President dealing with the Philippine Islands in reference to customs upon a different basis from the existing Tariff Laws of the United States, and assuming the power in time of peace to create collection districts, sub-ports of entry and civil offices, which, ordinarily at least, Congress has the sole power to do.

As further instances of this doubtful exercise of Presidential power:

By an order of April 17, 1899, six days after the Treaty of Cession, the Secretary of War, "by direction of the President," amended Paragraph 178 of his War Tariff by the addition of several articles to the dutiable list (Tariff Circular No. 53, War Dept., 17 April, 1899); by his order of May 3, 1899 (Tariff Circ. No. 65, War Dept., 5 May, 1899) the President constituted the Philippine Archipelago and the Island of Guam a Collection District, with Manila as chief Port of Entry, created several sub-ports of entry, and directed the appointment of collectors; by order of 8th May, 1899 (Circ. No. 20, Div. of Customs and Insular Aff.) "by virtue of his authority as Commander-in-Chief" he created offices such as auditor and sub-auditor in the Island of Guam.

All of these instances revealed the exercise of powers in time of peace, which were, to say the least, of questionable validity.

The power to create collection districts, ports of entry, ports of delivery, and sub-ports of entry, and to determine the number of collectors, has always been exercised by Congress (see Rev. Stat. Title "Collection of Duties upon imports, Chap. I."—"Collection Districts, Ports and Officers," §§ 2517, *et seq.*).

These are the "subsequent amendments" which Congress by the Act of July, 1902, has adopted as its own, thus ratifying a very doubtful exercise of power by the President taken under circumstances which called for action while they furnished little or no precedent for his guidance.

Here was ample subject matter for the Ratifying Act of Congress, without straining the interpretation of the act to cover duties which, as this Court has held, the original order never intended to exact; and this in the face of the other Acts of Congress freely refunding duties of the same character collected in Porto Rico. Any shadow of doubt cast upon any act of the Executive acting as Commander-in-Chief has always been considered sufficient excuse for a Ratifying Act by Congress. The leading cases of *Hamilton vs. Dillin* (21 Wall., p. 73) and *Prize cases* (2 Black, 635) involved ratifications by Congress of Presidential orders which the Court held were clearly within his war powers as Commander-in-Chief; acts done in time of war and essential as war measures.

In this instance, we have several orders made or interpreted in time of peace, upon the erroneous assumption so earnestly contended for by the Government in this case, that they were made in time of war, and under the war power. The ratification of such action by the Act of 1902 is a sufficient answer to the Government's query: What did the act of Congress ratify, if it did not ratify the collection of duties on shipments from the United States into the Philippines after the Treaty of Cession? And there is no need, in the endeavor to find a valid and important purpose in the act, to torture its terms into a confiscation of the plaintiffs' property without due process of law.

In conclusion we respectfully insist that there was no intention to ratify the collection of the sums sought to be recovered in this action, and no power in Congress to do so, if it had any such intention, and the decision already rendered should be maintained.

New York, 30 December, 1905.

PAUL FULLER,
FREDERIC R. COUDERT,
Of Counsel.

FILE COPY.

Court of the United States.

OCTOBER TERM, 1906.

No. 732.

No. 733.

Brief for Plaintiffs in Error and Appellants upon the Questions Reserved for Re-Argument.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN ET AL, Plaintiffs in Error. AGAINST UNITED STATES, Defendant in Error.	No. 149.
WARNER, BARNES & COMPANY, LIMITED, Appellant, AGAINST UNITED STATES, Appellee.	No. 466.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANT UPON THE QUESTION RESERVED FOR RE-ARGUMENT.

On November 13th, 1905, the Court made the following order in these cases:

> "Petition for a re-hearing granted as to the question whether Congress ratified the collection of the sums sought to be recovered in these suits and the cases assigned for argument on that point on January 2nd, 1905, after the cases already assigned for that day."

We have already submitted a brief upon these questions, but as the Court has ordered a re-argument and as we have now before us the briefs filed by the Attorney-General and Solicitor-General upon the petition for re-hearing stating the positions which they severally take, we think that it will promote the convenience of the Court as well as of counsel, although at the risk of some repetition, to file a new brief covering what we have already said and what we purpose to say on the re-argument.

The questions as stated by the Court in the order of May 29, 1905, granting leave to file the petition for rehearing were

> " whether Congress ratified the collection of the sums
> " sought to be recovered in these suits, and whether it
> " had power to do so."

We take it, however, that the Court did not mean to intimate by the change in the language of the later order that it had decided the question of power in favor of the Government. This question was presented to and considered by the Court upon the main argument and decided in our favor upon the authority of *De Lima vs. Bidwell* (197 U. S., 429 ; 182 U. S., 199), and we cannot assume that the Court has altered its decision and overruled the De Lima case upon this important point without having written a new opinion.

The difference in the terms of the two orders is therefore, as we understand it, a mere matter of phraseology. Though the first order specified the question as to the power of Congress it did so merely for the sake of greater clearness. The question whether Congress had the power to ratify is necessarily involved in the question whether Congress ratified ; for if it lacked the power it did not ratify, whatever may have been its intention.

For greater clearness, and in order to avoid repeating in the same words arguments already advanced, we shall treat the question submitted as one of the construction of the Act of July 1st, 1902 ; that is, of the meaning and application of the language used and of the intention of Congress ; adverting first to the constitutional objections to construing the act as a ratification of actions of the President which this Court has held to be beyond his power, then demonstrating that the express language used does not admit of the construction

advocated in behalf of the Government, nor does the legislative intent call for that construction, and, finally, pointing out what Congress intended to, and what this act does in fact, ratify.

We preface our points by saying that with respect to all questions other than the one reserved for re-argument, the opinion of the Court reported in 197 U. S., 419, and the opinion in the first Dooley case (182 U. S., 222), now by the opinion in this case reaffirmed upon all points, state the law of this case, and we shall base our argument largely on those propositions on which, as we understand it, the decision of the Court is finally and conclusively settled.

POINTS.

FIRST.

IF THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, WERE THAT IT RATIFIED AND LEGALIZED THE IMPOSITION AND COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS, THEN THE ACT WOULD PRO TANTO, BE UNCONSTITUTIONAL AND VOID.

1. *Under this construction the act would deprive claimants of their property without due process of law and appropriate it to the public use without compensation in violation of the Fifth Amendment.*

2. *Under this construction the act would also deprive claimants of their right of action without due process of law in violation of the Fifth Amendment.*

3. *Under this construction the act is open to the further objection that it amounts to a delegation of legislative power to the executive, in violation of the first and eighth sections of the First Article and of the second paragraph of the third section of the Fourth Article of the Constitution.*

4. *Under this construction the act, if valid, would necessitate the establishment of a new principle of law, that Congress has the power to ratify an unconstitutional act of the President.*

SECOND.

THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, IS THAT IT DOES NOT PURPORT TO AND DOES NOT RATIFY THE COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS.

I. *The language used has not the legal effect of ratifying the collection of these duties.*

1. *The collection of these duties by the authorities of the government of the Philippine Islands was not "action taken in accordance with the provisions of the order of July 12, 1898, and the subsequent amendments of said order."*

2. *The action of the President taken by virtue of the authority vested in him as commander-in-chief as set forth in his order of July 12th, 1898, which the act purports to ratify does not include the collection of these duties.*

II. *Congress cannot have intended to ratify the collection of the duties involved in these cases.*

1. *The Court will not impute to Congress the intention to deprive citizens of rights to which this Court had, at the time of the passage of the act, held that other citizens under like circumstances were entitled.*

2. *The ratification of the collection of these duties would be entirely inconsistent with the general policy of the legislation by Congress since the decisions in the first Insular Cases refunding all the duties which, as this Court decided, had been illegally exacted.*

3. *It is always to be presumed that Congress does not intend to violate any of the provisions of the Constitution, or to repudiate the obligations of the government.*

THIRD.

WHAT THE ACT OF JULY 1ST, 1902, WAS INTENDED TO RATIFY IS THE ACTION TAKEN BY THE PRESIDENT IN LEVYING AND COLLECTING DUTIES BY VIRTUE OF HIS AUTHORITY AS COMMANDER-IN-CHIEF AND THE ACTIONS OF THE AUTHORITIES OF THE PHILIPPINE GOVERNMENT TAKEN IN ACCORDANCE WITH THE PROVISIONS OF THE ORDER OF JULY 12, 1898, AND ITS AMENDMENTS—NAMELY, THE IMPOSITION AND COLLECTION OF DUTIES UPON IMPORTS FROM FOREIGN COUNTRIES INTO THE PHILIPPINES FROM THE TIME THE ORDER TOOK EFFECT, NOVEMBER 10TH, 1898, TO NOVEMBER 15TH, 1901, INCLUDING IMPORTS FROM THE UNITED STATES UNTIL APRIL 11TH, 1899.

I. *The legality of the collection of duties upon imports from foreign countries by order of the President, prior to legislation by Congress, in either the Philippines or Porto Rico has never been decided by this Court, and was therefore a question of some doubt.*

II. *Congress in ratifying (if it did ratify) the action taken by the President as to the legality of which there might be doubt, but which was probably within the scope of his constitutional power, followed its own precedents of a hundred years, but did not embark on a new course of legislation by attempting to ratify actions beyond the scope of the President's constitutional power as judicially defined.*

ARGUMENT.

Taking up these points in the order stated:

FIRST.

IF THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, WERE THAT IT RATIFIED AND LEGALIZED THE IMPOSITION AND COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS, THEN THE ACT WOULD PRO TANTO BE UNCONSTITUTIONAL AND VOID.

1. *Under this construction the act would deprive claimants of their property without due process of law and appropriate their property to the public use without just compensation in violation of the Fifth Amendment.*

(a) The subject matter with respect to which these moneys were exacted, and upon which this act would, by ratification, retrospectively authorize the imposition of a tax, is the exercise of the privilege of doing a certain act—to wit, landing in Manila goods brought from New York.

The act refers to the "action of the President, whereby a tariff of duties and taxes was to be levied and collected."

Customs duties are indirect taxes; that is to say, they are not levied upon the merchandise imported, but upon the *exercise of the privilege accorded by the sovereign of importing and landing foreign merchandise* within the territorial limits of the nation.

There can be no sound contention that the moneys sought to be recovered were exacted in payment of any direct or property tax. They were clearly levied and collected as customs duties, and the act refers specifically to a *tariff* of duties.

(b) It is the law of this case that, at the time of this exaction, claimants had the right to enjoy this privilege without the payment of any tax.

In the opinion in this case, 197 U. S., 428, the Court says:

> "Apart from the question of the duration of the "President's order, it plainly was an order intended to "deal with imports from foreign countries only and "Philippine ports not in the actual military control of "the United States."

In the first Dooley case, now reaffirmed in every particular by the opinion at bar, the Court says, 182 U. S., p. 235 :

> " The proper construction of that order is, that it
> " ceased to apply to goods imported from the United
> " States from the moment the United States ceased to
> " be a foreign country with respect to Porto Rico,
> " and that until Congress otherwise constitutionally
> " directed, *such merchandise was entitled to free entry.*"

And at page 236 (182 U. S.) :

> " In our opinion, the authority of the President as
> " Commander-in-Chief to exact duties upon imports
> " from the United States ceased with the ratification of
> " the treaty of peace, and her right to the free entry
> " of goods from the ports of the United States contin-
> " ued *until Congress* should constitutionally legislate
> " upon the subject."

In the opinion in this case, 197 U. S., 429, the Court says further :

> " The fact that there was an insurrection of natives
> " not recognized as belligerents * * * just outside its
> " [Manila's] walls, did not give the President power
> " to impose duties on imports from a country no longer
> " foreign."

These quotations show clearly that it is the settled law of this case that the claimants were entitled to free entry of their goods, both because the order did not apply to them and because the President had no power to impose these duties.

(c) The provision in the Fifth Amendment, that no person shall be deprived of his property without due process of law, requires with respect to the levy and collection of taxes, that Congress must state the subject matter and fix the rate of the tax by law before taking the property of any person in payment. This is an elementary principle of constitutional law. Due process of law is not limited in scope to judicial proceedings. It prohibits every deprivation of property by the Government in whatever form, particularly the taking of property in payment of taxes for the support of the Government.

With respect to all indirect taxes upon the exercise of a

privilege due process of law requires that the taxpayer shall have notice that the tax has been lawfully imposed and the option of exercising or not exercising the privilege. If he exercises it he becomes liable to the tax. Thus he has the opportunity of knowing in advance what he will have to pay for the exercise of this privilege. Where customs duties are levied due process requires that the importer shall have a chance to be heard as to the nature and value of his goods.

This has been held in many cases.

An Act of Congress imposing duties *prospectively* which failed to provide for giving the importer a hearing before some tribunal or officer as to the value and nature of his goods on whose importation the duties were levied would violate the requirement of due process of law.

> " The importers in this case—had full notice of the
> " proceedings before the board of general appraisers
> " upon their appeal to said board, and ample opportun-
> " ity to be heard, on the question of the market value of
> " the imported goods. It cannot, therefore, be properly
> " said that they have been subjected to penalties with-
> " out notice or an opportunity to be heard, or been de-
> " prived of their property without due process of law."
> *Passavant vs. United States*, 148 U. S., 214, 222.

Obviously when a customs tax is imposed *retrospectively* there can be no option as to the exercise of the privilege of importing or as to paying the duty and no opportunity for a hearing as to the nature and value of the goods, hence no due process of law.

(d) An Act of Congress, passed in July, 1902, imposing a tax upon the importation of all merchandise brought into Manila from New York between April 11th, 1899, and November 15th, 1901, would violate this constitutional requirement.

It matters not whether in passing such an act Congress was acting under the power to levy and collect taxes, duties, imposts and excises, or under the power to make rules and regulations for the government of the territory of the United States. In the exercise of either power Congress is equally bound by the limitations contained in the Constitution and amendments.

This Court has now finally declared the law to be that in legislating under the power to rule the territories, Congress is

limited by the *prohibitions* contained in the first ten amendments, and is bound by the limitations arising from the fundamental principles upon which our system of government is based.

Downes vs. Bidwell, 182 U. S., 244, 277, 282.
Dorr vs. United States, 195 U. S., 138, 147.

For a statement of the general principles involved see
Calder vs. Bull, 3 Dall., 386.

See, also,
Fletcher vs. Peck, 6 Cr., 87, 135.
Wilkinson vs. Leland, 2 Pet., 627, 657.

(*e*) Congress has not the power to impose, under the guise of ratification, a retroactive tax which it has not power at the time it acts to impose by direct legislation.

It is argued by the counsel for the Government that the question of the power of Congress to ratify the collection of the duties in suit is sustained by the maxim that every ratification relates back and has equal force with a prior mandate; that as, under the second Dooley case, 183 U. S., 151, Congress had the power to *impose* these duties on the eleventh of April, 1899, it follows from this maxim that it had power to ratify their *collection*. This argument begs the question. Furthermore the maxim is inapplicable to an act imposing a retroactive tax. It came into use as part of the law of principal and agent, and originally meant no more than that where the principal has ratified a contract made by one who assumed to act as his agent, he is as firmly bound by the contract as if his agent had had authority to act in his behalf at the time the contract was made. The maxim has also, of late years, been applied to *remedial* acts of the Legislature confirming acts of individuals, corporations, or minor legislative or administrative bodies which might have been held invalid or irregular because of some technical defect, and where the act of ratification carries out the true intent of the parties to a transaction and works substantial justice.

The cases cited by counsel for the Government (Original Brief, pp. 25, 26; last brief on petition for rehearing, pp. 16–17), are all to the effect that the Legislature has power to

pass *remedial acts* and that such acts do not violate the requirement of due process of law.

The doctrine of these cases is summed up in the case of *Foster vs. Essex Bank*, 16 Mass., 245, quoted with approval in *Freeborn vs. Smith*, 2 Wall, 160, 175, as follows :

> " The truth is there is no such thing as a *vested right* " *to do a wrong*, and the legislature which, in its acts, " not expressly authorized by the Constitution, limits " itself to correcting mistakes and to providing " remedies for the furtherance of justice, cannot be " charged with violating its duty, or exceeding its " authority."

The Court, in the same case, goes on to say :

> " Such acts are of a remedial character, and are the " peculiar subjects of legislation. They are not liable " to the imputation of being assumptions of judicial " power."

The cases cited by counsel for the Government do not hold, nor does any case we know of hold, that where Congress has *not* power to *impose* a tax retroactively, it nevertheless *has* power to ratify *the collection* of a tax whose payment was enforced by the executive wholly without warrant of law. It cannot be that the fact that these moneys wrongfully exacted from the claimants, were in the custody of the United States at the time of the passage of the act can have any bearing upon the power of Congress to ratify their collection. The whole course of action pursued by the Philippine Government in collecting these duties, especially after the decision of this Court in the first Dooley case, shows that it was considered doubtful whether the collection of duties in the Philippines on imports from the United States was lawful and that this doubt was resolved by the authorities in favor of the Government. The theory of law upon which these suits have been prosecuted and upon which they have been decided in our favor, is that the Government has in its possession moneys which rightfully belong to claimants. To hold that the possession of these moneys by the Government gives Congress power to transfer the title from claimants to the Government is to hold that

Congress has power to confiscate the property of the citizen without either just compensation or due process of law.

It has been squarely held in *De Lima vs. Bidwell*, 182 U. S., at 199, that Congress has not this power.

The case of *Kimball vs. Town of Rosendale*, 42 Wis., 407, cited at pages 15-16 of our brief on petition for rehearing, is directly in point upon the proposition now under discussion.

In that case it appeared that the Legislature of Wisconsin in 1871 had passed an act authorizing the town of Rosendale to subscribe to the stock of a railroad company under certain conditions, one of which was that the railroad should deliver its proposition for the issue of the stock to the town clerk and should within *three months* thereafter deliver to such clerk a copy or copies of the proposition bearing the written assent of a majority of the taxpayers. The act further empowered the town to issue bonds in payment for the stock and levy taxes for the payment of the bonds. The town did subscribe the stock and issue the bonds and levy the taxes, but its action was irregular, because the railroad failed to file the written assent of the taxpayers within the three months.

Taxes were assessed for several years by the town on the plaintiff and others. The plaintiff sued to recover the amount of such taxes collected from him.

In 1877 the Legislature passed a special act declaring that the several acts of the officers of the town in subscribing for the stock, issuing its bonds and assessing, levying and collecting the taxes to pay the same had or done in good faith in attempting to comply with the statute above recited "are hereby declared legal and valid to all intents and purposes, and shall be so taken and held to be in all the courts of this state."

The question decided by the Supreme Court of Wisconsin was whether the Legislature had power to ratify the action of the town officers in view of an amendment to the State Constitution adopted in 1871, after the passage of the original act authorizing the town to subscribe to the stock, which amendment prohibited the Legislature "from enacting special or private laws in nine several cases," the sixth being "for assessment or collection of taxes, or for extending the time for collection thereof."

The Court held that this provision against the *assessment*

and collection of taxes by special act prohibited equally the *ratification by special act* of the collection of taxes irregularly assessed; that the attempted ratification was void, and that, as the officers of the town had failed to comply with the provisions of the act authorizing the subscription, plaintiff was entitled to recover the amount of his taxes.

See, also, opinion of PECKHAM, J., in *Cromwell vs. MacLean*, 123 N. Y., 474, 491–494.

In *Smith vs. Stevens*, 10 Wall., 321, the question at issue was as to the validity of a deed made by an Indian. At the time of the making of the deed an Act of Congress was in force vesting the title to certain lands in certain Indians, including this grantor, and forbidding any future disposition of them except by the Secretary of the Interior upon request of the party interested. The deed in question was made without the intervention of the Secretary. Some two years after this transaction Congress passed a joint resolution removing the restriction on alienation. It was claimed in behalf of the plaintiff-in-error that this act ratified and validated this deed. Upon this point the Court says, at page 327:

> "It is hardly necessary to say that a joint resolution
> "passed nearly two years after this transaction, remov-
> "ing the restriction on alienation, cannot relate back
> "and give validity to a conveyance, which when executed,
> "was void, nor have we any reason to suppose that
> "Congress contemplated that any such effect would be
> "claimed for its legislation on the subject."

This case is followed in *Jones vs. Meehan*, 175 U. S., 132.

2. *Under this construction this act would also deprive claimants of their right of action without due process of law in violation of the Fifth Amendment.*

In *De Lima vs. Bidwell*, 182 U. S., 1 (on pp. 199, 200), this Court held that an act of Congress claimed to effect the ratification of the exaction of duties by the Collector, Bidwell, should not be construed so as to effect the ratification; for if so construed it would deprive plaintiff of his right of action.

We submit that the De Lima decision is a controlling authority on this point.

3. *Under this construction the act is open to the further objection that it amounts to a delegation of the legislative power to the executive in violation of the first and eighth sections of the First Article and of the second paragraph of the third section of the Fourth Article of the Constitution.*

The provisions of the Constitution referred to are as follows:

> ART. I., SECTION 1. "*All* legislative Powers herein " granted shall be vested in a Congress of the United " States which shall consist of a Senate and House of " Representatives."
>
> ART. I., SECTION 8. " *The Congress* shall have Power " To lay and collect Taxes, Duties, Imposts and Ex- " cises—To regulate Commerce with foreign Nations and " among the several States.—"
>
> ART. IV., SECTION 3, second paragraph. " *The Con-* " *gress* shall have Power to dispose of and make all " needful Rules and Regulations respecting the Terri- " tory or other Property belonging to the United " States."

The grant of these owers to Congress prohibits by implication their exercise by the President. Nor can Congress delegate any part of the legislative power to the President.

> "That Congress cannot delegate legislative power " to the President is a principal universally recognized " as vital to the integrity and maintenance of the system " of government ordained by the Constitution."
>
> *Field vs. Clark*, 143 U. S., 659, 692.

If this ratification has the force of a prior mandate, it still remains true that the President in originally establishing this tariff was legislating, as is conceded by the Attorney-General (Brief of October, 1905, pp. 13, 14), where he says:

> "If his orders to that effect before the treaty took " effect were, technically, legislation, that was valid " legislation beyond question, and needed no authority " or ratification from Congress. These orders *fell*, let " us say, *as valid legislation* on April 11th, 1899, but " the President continued to do the thing prescribed " without immediate authority. *He did not legislate,* " *he did not re-establish former legislation; he simply* " *acted and continued to act.* He was simply acting " after April 11, 1899, not legislating."

Admitting, for the argument, that the President's order by its terms authorized the collection of duties on imports from the United States after the ratification of the treaty, this order is not less an act of legislation by the President with respect to such imports because it was made in July, 1898, than if it had been made on April 11th, 1899. By the treaty the United States was no longer foreign to the Philippines, and the spirit and letter of the tariff laws authorized the President to collect duties on imports from foreign countries only. Therefore, when he performed the executive act of collecting the duties from the United States he must have performed the legislative act of imposing them. If not, then the subordinates who actually collected the duties on imports from the United States were not acting in accordance with the provisions of the order. This has been our contention throughout.

If this was legislation by the President it could not be ratified by Congress because that would amount to a delegation of the legislative power. If it was not legislation, then the subordinates who collected the duties were not acting in accordance with the provisions of the order and amendments, and therefore, as we shall point out below, their action was not ratified by Congress.

4. *Under this construction this act if valid would necessitate the establishment of a new principle of law, that Congress has power to ratify an unconstitutional act of the President.*

(a) It is the law of this case that the President had not the constitutional power to levy and collect these duties.

In *imposing* these duties by the order of July 12, 1898, the President, as appears upon the face of the order, was exacting a military contribution during a war in the exercise of his constitutional powers as commander-in-chief and in *collecting* them through his military subordinates, during the war, he was acting in the same capacity. But, the war having terminated upon the ratification of the treaty, the authority of the President either to impose or collect duties *under the war power* ceased. From this time on he had no further power to *legislate* with respect to the Philippine Islands except in so far the necessities of the case required the maintenance and administration of a *de facto* civil government. Beyond this

he had no more power to legislate in the Philippines than elsewhere in the United States.

This is clearly laid down in the opinion in this case at page 429, where the Court says :

> " The fact that there was an insurrection of natives " not recognized as belligerents in another part of the " island, or even just outside its (Manila's) walls *did* " *not give the President power* to impose duties on im- " ports from a country no longer foreign (See Dooley " vs. United States, 182 U. S., 222, 234)."

His act, therefore, in collecting these duties (if it was the act of the President and not merely the unauthorized act of his subordinates) was in violation of the Constitution.

(*b*) No case upon the subject of ratification has gone so far as to hold or imply that Congress can deprive a citizen of property by ratifying an unconstitutional act of the President.

Counsel for the Government have cited several decisions of this Court upon the proposition that the ratification here was undoubtedly within the power of Congress. Out of respect for the learning and industry of the Attorney-General, the Solicitor-General and their assistants, we shall assume that in the five briefs (including the petition for rehearing) they have cited all the cases which are to be found upon the power of Congress to ratify the action of the President.

These cases are *Cross vs. Harrison*, 16 How., 164 ; *Prize Cases*, 2 Black, 635 ; *Hamilton vs. Dillin*, 21 Wall., 73 ; *Brown vs. United States*, 8 Cr., 131 ; *The Grapeshot*, 9 Wall., 129 (Brief of Atty.-Gen. of Oct., 1905, pp. 17-20 ; Brief of May, 1905, p. 21).

None of these cases holds that Congress has power to ratify an unconstitutional act of the President.

As *Hamilton vs. Dillin* is apparently relied on as the most important of these cases, we shall consider it first.

That case involved really but one question—whether Congress could authorize the President to, and the President in the exercise of the war power could, impose a license fee as a condition upon trading with the enemy. The Court held that *under the war power of the United States* both Congress and the President have the power to impose any limitations upon trade with the enemy, and that Congress can ratify an

act *which they had previously authorized* and which the President had *power to do without authorization.*

With regard to the constitutionality of the Act of July 13th, 1861, which authorized the President to regulate commercial intercourse with the insurgent states, the Court says at page 97 :

> " As before stated, the power of the government to
> " impose such conditions upon commercial intercourse
> " with *an enemy in time of war* as it sees fit is un-
> " doubted. It is a power which every other govern-
> " ment of the world claims and exercises, and which
> " belongs to the government of the United States *as*
> " *incident to the power to declare war* and to carry it on
> " to a successful termination. We regard the regula-
> " tions in question as nothing more than *the exercise of*
> " *this power.* It does not belong to the same category
> " as the power to levy and collect taxes, duties and ex-
> " cises. It belongs to the war powers of the govern-
> " ment, *just as much so as the power to levy military*
> " *contributions or to perform any other belligerent act.*"

Clearly then the doctrine of *Hamilton vs. Dillin* does not apply here. It is the law of this case that these duties were *not exacted under the war power of the President* and that the President had no power in any capacity to impose them.

In *Cross vs. Harrison*, 16 How., 164, 201, the Court held that the President had power to impose duties on imports from foreign countries and that Congress ratified this collection (9 Stat., 412; 10 Stat., 178). This is very far from being an authority for the proposition that Congress can ratify an unconstitutional act of the President.

In *Brown vs. United States*, 8 Cranch, 110, the questions involved, as clearly appears from the opinion of Chief Justice MARSHALL, pp. 121-129, were whether Congress by the declaration of war against Great Britain in the Act of June 18, 1812, had authorized the President to condemn British property found in the United States on land at the beginning of hostilities, and if not whether the President had the power to condemn without such authorization. Both questions were answered in the negative. There is no question in the case as to the power of Congress, by subsequent legislation, to legalize an unconstitutional act of the President. The reference to

this case by the learned Attorney-General is to the dissenting opinion of Justice STORY, not to the opinion of the Court.

IN *The Grapeshot*, 9 Wall., 129, it was held that the President *had power* during the civil war to establish provisional courts within the insurgent territory of Louisiana and that Congress had power upon the close of the war and the consequent dissolution of the court to enact that all judgments and decrees of the provisional court should be transferred to the Circuit Court of the United States and have the same effect as if the suits had been originally brought therein.

In the *Prize cases*, 2 Black, 635, the court decided by a majority of the Justices that the President had the power, as a war measure, to proclaim and enforce a blockade, without prior authorization by Congress, and further decided that Congress had ratified that action. The Court *did not* however, decide that if the President in so doing had *exceeded his constitutional power*, Congress by ratifying could have deprived the claimants of their right of recovery.

The four Justices who dissented (Chief Justice TANEY, Justices NELSON — who wrote the dissenting opinion — CATRON and CLIFFORD) held that the President, in proclaiming and enforcing a blockade without prior authorization by Congress, acted beyond his constitutional power and that his seizure of claimants' property amounted to confiscation, just as in the cases at bar this Court has held that the act of the military authorities in the Philippines in exacting the payments of these duties was confiscation. Upon the question of the power of Congress to ratify an unconstitutional act of the President they say (p. 697) :

> " Congress on the 6th of August, 1862, passed an
> " act confirming all acts, proclamations and orders of the
> " President after the fourth of March, 1861, respecting
> " the army and navy, and legalizing them, so far as was
> " competent for that body, and it has been suggested,
> " but scarcely argued, that this legislation on the
> " subject had the effect to bring into existence an
> " *ex post facto*, civil war with all the rights to cap-
> " ture and confiscation *jure belli* from the date referred
> " to. An *ex post facto* law is defined when after an action,
> " indifferent in itself, or lawful is committed, the Legis-
> " lature then, for the first time declares it to have
> " been a crime and inflicts punishment upon the person

" who committed it. *The principle is sought to be*
" applied in this case. *Property of the citizen or foreign*
" *subject engaged in lawful trade at the time and illegally*
" *captured, which must be taken as true, if a confirmatory*
" *act be necessary*, may be held and confiscated by sub-
" sequent legislation. In other words, trade and com-
" merce authorized at the time by acts of Congress and
" treaties, may by *ex post facto* legislation be changed
" into illicit trade and commerce with all its penalties
" and forfeitures annexed and enforced. * * * Here
" the captures were *without any constitutional authority*
" *and void; and on principle no subsequent ratification*
" *could make them valid.*"

(c) To hold that Congress has this power would be to establish a rule by which the underlying principle of the separation of the functions of the Executive and of the Legislature could be set at naught and great abuses introduced.

If Congress has the power to ratify this unconstitutional act of the President in collecting these duties, it must have the power to ratify all other unconstitutional acts and to give validity by ratification to the exercise of the legislative power by the Executive. This would in effect make the Executive the master of the Legislature, and destroy the balance of power which the Constitution was intended to preserve.

We say it would make the Executive the master of the Legislature. It is easy to furnish an example. The Executive might legislate and act to such an extent that his actions would go far beyond the possibility of recall. He might commit so enormous a wrong that Congress, although it had refused to authorize, would be compelled to ratify. If this doctrine that Congress has power to ratify an unconstitutional act of the Executive be sound, let us suppose that the President concluded that the public revenue of the United States was insufficient to meet the expenditures, and thereupon by executive order imposed a duty of five cents a pound upon all coffee imported into the United States now entitled to free entry. The collectors of customs would undoubtedly follow the order and collect the duties. Can it possibly be the law that after seven millions or any other sum had been collected as duties a future Congress would have power to ratify this action and give to such a confiscation of property the full sanction of a prior law? If so, let us suppose that

the President and a majority of the Congress entertain conflicting opinions upon the subject and that therefore no act can be passed to provide revenue. Could the President change the existing laws, increase the tariff, or the internal revenue laws, and then obtain a ratification of all his acts by a subsequent Congress of his own party? These assumed cases may seem extravagant. They are identical in principle with the present case if the Government's contention is sound.

It is now urged in this Court in behalf of the Government as a reason for dismissing the petitions of these claimants that the amount of duties collected from them and from others whose claims have been filed is very great. In other words, that this wrong is so enormous that the Court should declare that it is right.

This is an argument that one might expect to hear addressed to a group of financiers, but not to this Court. It may be "high finance"; it is not law.

SECOND.

THE PROPER CONSTRUCTION OF THE ACT OF JULY 1ST, 1902, IS, THAT IT DOES NOT PURPORT TO AND DOES NOT RATIFY THE COLLECTION OF THE DUTIES INVOLVED IN THESE SUITS.

I. *The language used has not the legal effect of ratifying the collection of these duties.*

1. *The collection of these duties by the authorities of the Government of the Philippine Islands was not "action taken in accordance with the provisions of the order of July 12th, 1898, and the subsequent amendments of said order."*

(a) It is the law of this case that this order by its terms applied to importations into the Philippine from foreign countries and Philippine ports not in the actual military control of the United States, and therefore ceased to apply to importations from the United States the moment that the United States ceased to be a foreign country with respect to the Philippines, namely, upon the ratification of the treaty.

In the opinion in this case, the Court says at page 428:

> " It plainly was an order intended to deal with im-
> " ports from foreign countries only and Philippine ports
> " not in the actual military control of the United
> " States."

and in the first Dooley case, 182 U. S., at page 235, the Court says:

> " Without questioning at all the original validity of
> " the order imposing duties on goods imported into
> " Porto Rico from foreign countries, we think the proper
> " construction of that order is, that it *ceased to apply to*
> " *goods imported from the United States* from the mo-
> " ment that the United States ceased to be a foreign
> " country with respect to Porto Rico."

(b) The amendments did not change the meaning of the order in this particular.

Before discussing this point we should call the attention of the Court to the two entirely inconsistent positions taken by the Attorney-General in his briefs of October and of May with reference to the scope and effect of the amendments.

In the brief filed May 17, 1905, the learned Attorney-General says, at page 16, after quoting the portion of the opinion in this case found in 197 U. S., at 429:

> " It is difficult to follow the reasoning of the learned
> " justice. The section approves 'the actions of the
> " 'government of the Philippine Islands' 'taken in
> " 'accordance with the provisions of said order and
> " 'subsequent amendments.' He says that 'the approval
> " 'of the action of the authorities is confined to those
> " 'which were in accordance *with the order*, which, as
> " 'we have already intimated, the collection of these
> " 'duties was not.' With deference, the approval is not
> " confined to those actions in accordance with the
> " order, but it is expressly and *ex industria* extended to
> " include those which were taken in accord *with subse-*
> " *quent amendments.*"

The learned Attorney-General next refers at some length to the language of the various orders of April 10, 1899 (p. 17),

May 3, 1899 (p. 18), claimed to be amendments, and continues, at page 19:

> "The statement of facts will have utterly failed in "its purpose if it does not show that by the order of "May 3, 1899, the President intended to amend the "order of July 12, 1898, by treating it in force after the "war and by continuing it with a few amendments, that "he intended thereby to impose duties on goods com- "ing from the United States, and that the collection of "duties accordingly was known to him and approved "by him."

One would gather from this argument that the learned Attorney-General contended that, after April 11th, 1899, the President so amended his order of July 12th, 1898, as to make it in terms applicable to goods from the United States. In other words, that, by so amending, he legislated.

Compare, then, the following statements at pages 13-14 of his brief of October, 1905.

> "We shall endeavor to state the point briefly and "clearly; the President during the war emergencies "directed his officers to act in a certain way, to col- "lect duties under a provisional tariff. If his orders "to that effect before the treaty took effect were, tech- "nically legislation, that was valid legislation beyond "question and needed no ratification from Congress. "These orders fell, let us say, as valid legislation on "April 11, 1899, but *the President continued to do the* "*thing prescribed without immediate authority. He did* "*not legislate; he did not re-establish former legisla-* "*tion;* he simply acted and continued to act."

In other words the latest position of counsel for the Government seems to be that they concede that after April 11th, 1899, the President "did not legislate" that is he did not by any amendment or subsequent order attempt to *impose* duties on imports from the United States; he "simply acted," that is, we apprehend, through his subordinates, *collected* these duties "without (immediate) authority." This is equivalent to an admission that the amendments made after April 11th, 1899 did not change the proper construction of the order and that the subordinates misconstrued the order; exactly our position on this point.

It may be, however, that the Government still relies upon the arguments advanced in the brief of May to the effect that these amendments did change the meaning of the order by making it applicable to imports from the United States.

In our brief in opposition to the petition for rehearing (pages 3–6) we discussed the so called "amendments" or orders of October 10, 1898, December 21st, 1898 and May 3, 1899 and pointed out that the first two, made before the ratification of the treaty of peace, did not purport to change the language of the order by making it apply to imports from the United States after the ratification nor did the order of May 3, 1899 which made the Philippines and Guam a collection district, with Manila the chief port of entry, and provided for the assignment of an army officer as collector. The order of December 21, 1898, by which the President upon the signing of the treaty and in anticipation of its ratification, proclaimed the sovereignty of the United States over the Philippines, expressly provided that all goods should be admitted upon payment of the duties in force at the time of their importation. Far from being an extension of the order of July 12, 1898, so as to include imports from the United States, it amounted to an abrogation of that order as a war measure and an express direction to the authorities of the Government of the Philippines to collect only such duties as might at the time of importation be lawfully in force. The only duties lawfully in force after April 11, 1899, were duties on imports from foreign countries. A further order was made on May 8th, 1899 providing for the appointment of auditors of the various departments of the military government in the Philippines and in October 1899 an order was made by the military governor republishing the order of July 12th, 1898 with all its amendments to date.

This last named order reads as follows :

> " Office of the U. S. Military Governor of the Philippine Islands.
>
> " Manila, P. I. October 23, 1899.
>
> " General Orders No. 49.
>
> " The Customs Tariff and Regulations promulgated " in General orders of 26th of last October from this " office having been amended from time to time since " that date, the following revised printed schedules " of the same which *contain all amendments to September*

" *1st last* is hereby published for the information and " guidance of all concerned.

" Upon the occupation and possession of any ports " or places in the Philippine Islands by the forces of " the United States, not as yet in United States oc- " cupancy, this order will be proclaimed and enforced.

" By command of Major General OTIS,

" THOMAS H. BARRY,
Assistant Adjutant General."

As expressly stated in this order the printed schedules annexed contain all amendments of the original order of July 12, 1898, up to September 1st, 1899, and on referring to these schedules we find not a word which alters the provisions of that order with respect to the subject matter of the duties. There are certain sections added, one numbered " ½ " in relation to the port of Manila having been established as the chief port of the Philippines, others with regard to modifications of administrative details, and there are certain slight changes in the rates of duty. Otherwise, the various sections and schedules in this order of October 23, 1899, are the exact counterpart of the sections and schedules in the order of July 12, 1898.

Clearly this order of October 23, 1899, embodying all the orders promulgated before its issue, did not specifically impose duties on imports from the United States, nor did it impose such duties by implication any more than did the order of July 12th, 1898, which has been held not to impose such duties, either expressly or by implication.

The provisions that merchandise imported, exported or in transit for the use of the Government should be exempt from wharf charges (paragraph 18); that supplies for the use of the Army and Navy should be admitted free (paragraph 22), and that articles purchased with the funds of the United States for its use and materials for public works should be exempt (paragraph 367) were all contained in the schedules annexed to the original order of July 12, 1898, and are all entirely consistent with a right to free entry of goods from the United States; for all these provisions have force and effect, the tariff applying to foreign imports only. Moreover, there are substantially identical provisions in the Amended Customs Tariff and Regulations for Ports in Porto Rico construed by this Court in the first Dooley case.

An equally strong, if not stronger, inference could have been drawn that the Porto Rican order applied to imports from the United States after April 11, 1899, from the fact that the President collected duties on such imports and manifestly intended that the order should so apply.

On May 8th, 1899, nearly a month after the ratification of the treaty and the very day that he issued a similar order with reference to the Philippines the President issued an order "by virtue of the authority vested in me as commander-in-"chief of the Army and Navy," creating in and for the Island of Porto Rico the offices of auditor and assistant auditor for the Customs, and auditor for the Post Office, to be appointed by the Secretary of War, and treasurer of the islands, to be filled by the appointment thereto of an officer of the regular army, and authorizing the Secretary of War to carry into effect the provisions of executive orders.

On May 27th, 1899, the United States Insular Commission, appointed by the President to investigate into the civil affairs of the island, made its report to the Secretary of War, from which we quote as follows:

At page 74:

"*No law has been passed by Congress* making the "island a collection district * * * and no law has "been prepared fixing the duties as between this coun-"try proper and dependencies or outlying possessions, "as doubtless may be done under the wording of the "Constitution. So duties on the goods imported into the "United States are still as though Porto Rico were a "foreign country. *Duties are likewise demanded, though "at different rates, in some instances as before the cession "from Spain, on all goods imported into Porto Rico "from the United States.*

"Since the cession has become complete by ratifica-"tion by the Senate and full recognition has been made "by the proper authority of the United States of the "fact that Porto Rico is a part of our possessions, it "can no longer be regarded as foreign."

"We have no doubt of *the power of the President*, as "Commander-in-Chief, to prescribe the rates of duty "on goods imported from all countries into the island, "*including those coming from this country as well, and "such power has already been exercised*, until Congress "shall assert its power to act and make its own regula-"tions."

"Whether the President can make different rates "on goods from the United States than from other "countries is a different and more perplexing ques- "tion."

"Since the provisions of the reciprocity laws of the "United States provide for a treaty to be made by the "President with the advice and consent of the Senate, "with some foreign power, and since there is, as to "Porto Rico, no one to treat with and no foreign "power, clearly this provision will not apply, other- "wise reciprocal arrangements could be made as to "goods and products of the island not grown and pro- "duced here, and similar goods grown and produced "here and not there, and some could be placed on the "free list and others reduced on approval of Congress."

"It would seem that the relations between the "island and the General Government would emphasize "the need and utility of such reciprocity, and of some "means through which the President would be author- "ized to give relief to the island and some advantage "for marketing our surplus of agricultural products "and manufactured goods, so much needed by the "people of Porto Rico."

"We would, therefore, recommend that Congress be "asked to authorize the President to make such modi- "fications in the tariff schedule between the United "States and Porto Rico as he may deem wise pending "the action of Congress in fixing the full status of the "island province, and regulations of customs duties and "such interchange of commodities as they may estab- "lish by law.

"We would, however, recommend that as to duties "collected on the island some measure of relief be "afforded the people there and trade be encouraged "with the United States.

"We think the articles above named (wheat, flour, "machinery, canned goods, etc.) and many others "*should receive special consideration in the duties to be* "*exacted*, and that the schedules be revised *in advance* "*of any general law by Congress.*"

It thus appears that only six weeks after the ratification of the treaty the administration had before it, presented to it by its own commission, first, the question as to the power of the President to continue to collect duties on imports from the United States into Porto Rico, and second, the fact that such duties were in fact being collected after the ratification of the treaty. Yet the military authorities, without further modification of the President's order, continued to *collect* duties

on imports from the United States. The intention of the executive could not have been clearer than it was with respect to Porto Rico.

These amendments of the Porto Rican order and this report were all before this Court, in the form of judicial notice at least, when it decided the first Dooley case, yet, no suggestion was made that they had any bearing on the construction of the Porto Rican Tariff order with respect to imports from the United States.

Further light upon the proper construction of the order of July 12th, 1898, and its amendments, if any is required, with regard to its applying to goods imported from the United States after April 11th, 1899, is cast by the language of the Tariff Revision Law of the Philippine Commission enacted September 17th, to take effect November 15th, 1901, and of the Act of Congress of March 8th, 1902.

It will be borne in mind that up to the time of the passage of the Revision of 1901, there had been three tariff orders in force in the Philippines. The first issued by the general in command continuing the Spanish tariff in force; the second, the order of July 12th, 1898, put in force November 10th, 1898, made under the proper exercise of the war power of the President during the war with Spain, and applying, during the war, to imports from all foreign countries which term, during the war, included the United States; the third, the order of the military governor of October 23d, 1899, G. O. 49, republishing the order of July 12, 1898, with all amendments to date of September 1st, 1899. While this order was in force this Court, on May 27th, 1901, decided the first Dooley case, holding that the similar Porto Rican order did not apply to imports from the United States after April 11th, 1899. After this decision and while the *Diamond Rings* case was still under advisement, the Philippine Commission on September 17, 1901, passed "An Act to Revise and *Amend* the Tariff Laws of the Philippine Archipelago." This Act by Section I. provided that:

> "The provisions of General Order No. 49 Office of
> "the United States Military Governor—dated October
> "23, 1899, relating to customs duties on imports and
> "exports of the Philippine Islands—and the several
> "orders supplemental thereto and amendatory thereof
> "are hereby *amended* to read as follows:"

"SECTION 2. Duties shall be collected on all articles, "goods and merchandise *imported into the Philippine* "*Islands*, at the rates hereinafter prescribed, except "when expressly exempted from duty by this Act."

SECTION 10. "*Importations from the United States* "*are dutiable* under the provisions of this Act, but no "customs duties shall be imposed on articles, goods "or merchandise transported only from one place or "port to another place or port in the Philippine "Islands."

This enactment of the Philippine Commission was not a mere continuation of the former tariff but an express amendment. It contains in Section 2 language far more specific than that of the order of July 12, 1898, in defining the subject matter on which the tax was imposed namely "on *all articles*, goods and merchandise *imported;*" the order of July, 1898, having merely provided that "upon the occupation and pos- "session of any ports and places in the Philippine Islands— "the following tariff of duties and taxes to be levied as a mili- "tary contribution—shall take effect and be in force." The order of October 23, 1899, did not actually *impose* a tax upon anything but assumed that the tax had been already imposed and stated the rates of duty to be collected and the manner of collection.

Plainly then the learned gentlemen who on September 17th, 1901, were legislating as the Philippine Commission "By the authority of the President of the United "States and with the approval of the Secretary of "War first had" were of the opinion and rightly so, that the words "Duties shall be collected "on all articles imported into the Philippine Islands" would not apply to articles brought (not imported) from the United States, consequently they enacted a special section, nothing similar to which had before been included in any order or amendment, providing in plain and unequivocal language that "Importations from the United States are dutiable under the "provisions of this Act."

This it seems to us is a clear admission that up to that time importations from the United States after April 11, 1899, had not been subject to duty.

Despite this explicit language in the Tariff Act of the Philippine Commission, imposing duties on goods imported from the United States, Congress had such grave doubts as to the power of the Commission to impose such duties that in the first section of the Act of March 8, 1902, 32 Stat. 54, it first provided

> " That the provisions of an Act entitled ' An Act to
> " ' revise and amend the tariff laws of the Philippine
> " ' Archipelago ' enacted by the United States Phil-
> " ippine Commission on the seventeenth day of Septem-
> " ber 1901 shall be and remain in full force and effect."

Had the Philippine Commission, acting at the time under power delegated to it by the president, and having, we may assume for argument, the power of the president, certainly no greater power, by this act, effectually, that is to say with constitutional authority and power so to do [for of the meaning of their language there can be no doubt] imposed duties upon articles imported or brought into the Philippines from the United States, it is entirely clear that the above provisions of the Act of Congress of March 8, 1902, would, under the decision of this Court in the second Dooley case, 183 U. S., 151, have imposed duties upon imports from the United States; but so doubtful was the power of the President, through his appointees the Commission to impose these duties that Congress further enacted in the following clause :

> " *and* there shall be levied, collected and paid upon all
> " articles coming into the Philippine Archipelago from
> " the United States the rates of duty which are required
> " by the said Act to be levied,"

not upon articles imported from the United States as the Act of the Philippine Commission expressly provides, but

> " upon like articles imported from foreign countries
> " into said Archipelago."

In other words, Congress by this act, far from ratifying the previous collection of duties on imports from the United States by the President acting either through the officers of the army or through the Commission, utterly ignores the fact

that the army officers had collected such duties under the official misconstruction of the President's order of July 12, 1898, and that the Commission not only collected, but expressly, in clear and unmistakable language, attempted to impose them. This act is clearly prospective and shows plainly that at the time of its passage Congress had not in mind the ratification of the collection of duties on imports from the United States under the order of July 12, 1898.

Surely the language of this act shows that Congress believed that it alone had the power, as this Court said in the first Dooley case, to impose duties on imports from the United States and that neither did the President have the power to, nor did his orders with their amendments, impose such duties.

(c) These duties were all collected by the authorities of the government of the Philippine Islands under an erroneous construction of this order and its amendments.

The reason that the Secretary of War, in his cable of June 8, 1901 (quoted in full in Attorney General's brief of May, 1905, pp. 8, 9), directed the authorities of the military government to continue to collect these duties after this Court had held in the first Dooley case that the similar Porto Rican order did not apply after April 11th, 1899, to imports from the United States, is obviously that, until this Court should have decided the Diamond Rings case, it was still a doubtful question whether the fact of the insurrection authorized the collection of these duties as a military contribution; in other words, whether, because of that insurrection, the Philippines and the United States were foreign the one to the other. The Executive Department very properly resolved this doubt in favor of the Government, for the Government could not have collected the duties afterwards, once the goods had been admitted free.

The Diamond Rings opinion was not handed down until December 2, 1901, several weeks after the order of July 12, 1898, and its amendments, had been superseded by the Tariff Revision Law of 1901 enacted by the Philippine Commission September 16, 1901, to take effect November 15, 1901.

Of all the orders, amendments and other directions of the executive department, this cable of June 8, 1901, alone specifically directs the collection of duties on imports from the United States; but it is perfectly clear, from the terms

of this cable, that it did not purport to amend or enlarge the scope of the order of July 12th, 1898, in any way, or to impose duties, but was a mere statement of the construction which the Administration placed upon that order until the decision of this Court as to the legal status of the Philippines should be known.

It was an erroneous construction of the meaning and application of the order of July 12th, 1898; but, had the Diamond Rings decision been handed down at the same time with the decision in the first Dooley case, we are confident that so good a lawyer as the then Secretary of War would have seen that, under the two decisions, the meaning of the order was no longer doubtful, and he would have, therefore, directed the free entry of goods from the United States until Congress should constitutionally legislate on the subject.

(*d*) The act, by express language, ratifies only the action of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order and its amendments. The collection of duties on imports from the United States after April 11th, 1899, was not in accordance with the provisions of the order and its amendments, and therefore was not ratified.

The second section of the Act of July 1st, 1902, 32 Stat., 691, is the only enactment by Congress now claimed to effect a ratification of the collection of these duties which requires serious consideration. Its language should, however, be read in connection with the language of the Act of March 8th, 1902, which is expressly excepted from amendment or repeal by implication (proviso to second section).

We have already adverted, under subpoint *b* *supra*, to the peculiar language of the Act of March 8th. Far from ratifying the imposition or collection of duties theretofore made by any order of the President or of the Commission, Congress by that act, while recognizing and continuing in effect the Tariff Act of the Commission in so far as it applied to foreign countries, wholly ignored the attempted imposition by the Commission of duties on imports from the United States, and expressly imposed such duties for the future by an independent clause, in addition to the clause continuing in force the tariff enacted by the Commission. It appears, therefore, that Congress,

not merely by a presumption of law, but clearly, from the language used in this Act of March, 8th actually knew the decisions of this Court in the Insular Cases. It knew that the President had not, and that Congress alone had, the power to impose these duties. Congress even went so far as to distinguish with technical nicety, having in view the decision of this Court in the second Dooley case, between articles "coming "into the Philippines from the United States," and "articles "imported' from foreign countries;" a verbal distinction which the learned Commission had not borne in mind.

The language of the Act of July 1st, 1902, shows even more plainly that Congress had in mind the decisions of this Court in the Insular cases and that what it meant to do was to ratify and approve the actions of the President in the Philippines similar to his actions in Porto Rico which this Court had decided to have been within his constitutional power.

The Act of July 1st, 1902, second section, reads:

> "SEC. 2. That the action of the President of the "United States *heretofore taken by virtue of the au-* "*thority vested in him as Commander in Chief* of the "Army and Navy *as set forth in his order* of July 12th, "1898, whereby a tariff of duties and taxes *as set forth* "*by said order* was to be levied and collected at all "ports and places in the Philippine Islands, upon "passing into the occupation and possession of the "forces of the United States, together with the subse- "quent amendments of said order, are hereby approved, "ratified and confirmed, and the actions of the au- "thorities of the government of the Philippine "Islands, *taken in accordance with the provisions of* "*said order and subsequent amendments*, are hereby "approved, *Provided*, that nothing contained in this "section shall be held to amend or repeal an Act en- "titled 'An Act temporarily to provide revenue for the "Philippine Islands and for other purposes."

In construing this act the first endeavor of the Court must be to ascertain the intent of Congress; this intent is to be ascertained from the language of the act, giving due effect to each and every word, not by first determining the intent of the President and then saying that inferentially the intent of Congress must have been the same, nor by stating what the administration wanted or what secret meaning the draftsman

of the act had in mind which he did not venture to express in plain, unequivocal and concise language.

When the meaning of an act is plainly apparent and that meaning gives effect to the act and at the same time works substantial justice and brings the act clearly within the constitutional power of Congress, that meaning is to be adopted in preference to one which would make the constitutional validity of the act very doubtful, would impose a retroactive tax under the guise of ratification and deprive citizens of rights to which this Court had, before the passage of the act, held that they were entitled.

The words upon which this part of the controversy hinges are

> " the actions of the authorities of the Government of
> " the Philippine Islands *taken in accordance with the*
> " *provisions of said order and subsequent amendments*
> " are hereby approved."

This is necessarily equivalent to saying that the actions not taken in accordance with the provisions of the order are not approved.

The first question, then, is what actions taken by the authorities of the Government were in accordance with the provisions of the order of July 12th, 1898, and its amendments? Plainly, the collection of such duties as the order and its amendments under their proper construction authorized. As we have seen, the order and its amendments authorized the collection of duties on imports from foreign countries, including imports from the United States until April 11th, 1899. As we have also seen, the order did not, nor did any of its amendments apply to, imports from the United States after April 11th, 1899, nor had the President power to make an order imposing duties on imports from the United States after that date. Therefore, the actions of the authorities in collecting duties on imports from the United States after April 11th, 1899, were not in accordance with the provisions of the order and hence were not ratified, and so this Court has expressly held in this case, 197 U. S., page 429, where it says:

> " Without considering how far the first part of the
> " section extends, the approval of the action of the au-

> " thorities is confined to those which were in accordance
> " with the provisions of the order, which, as we already
> " have intimated, the collection of these duties was
> " not."

Obviously, in rendering its decision upon this point, the Court had in mind the amendments as well as the order, all of which were before it on the main argument.

The amendment made by the order of December 21st, 1898 (Petition for Rehearing, p. 5), expressly provided that—

> " all goods and wares not prohibited for military rea-
> " sons by due announcement of the military authorities
> " will be admitted upon payment of such duties and
> " other charges *as shall be in force at the time of their*
> " *importation.*"

As we have seen above (pp. 20–23), no other of the so-called amendments altered the meaning of the order of July 12, 1898, and the only duties in force at the time of the importation of the claimants' goods were those prescribed by that order, or by the general tariff laws of the United States, both of which applied only to imports from foreign countries. This amendment, therefore, amounted to an express direction from the President to his subordinates not to collect any duties except such as were authorized by that order, or by the statute which might be in force at the time of the importation. In collecting duties on imports from the United States after April 11th, 1899, the subordinates were not acting in accordance with the provisions of this amendment and therefore such collection is not ratified.

2. *The action of the President taken by virtue of the authority vested in him as commander-in-chief as set forth in his order of July 12th, 1898, which the act purports to ratify, does not include the collection of these duties.*

(*a*) It is the law of this case that the authority vested in the President as commander-in-chief did not extend so far as to empower him to impose or collect duties on imports from the United States into Manila after the ratification of the treaty.

First, as to the imposition of these duties by the President. It is finally and conclusively settled by the opinions of

this Court in the first Dooley case and in this case that the President had not the power to impose these duties after the ratification of the treaty. At page 429 in a passage which we have already quoted at page 7, *supra*, this Court says:

> " The fact that there was an insurrection of natives
> " not recognized as belligerents in another part of the
> " island, or even just outside its (Manila's) walls did
> " not give the President power to impose duties on im-
> " ports from a country no longer foreign. See *Dooley*
> " *v. United States*, 182 U. S., 222, 234."

In the Dooley case at page 234 this Court said:

> " We have no doubt, however, that from the neces-
> " sities of the case, the right to administer the govern-
> " ment of Porto Rico continued in the military com-
> " mander after the ratification of the treaty, and until
> " further action by Congress. *Cross v. Harrison*, above
> " cited. At the same time while the right to administer
> " the government continued, the conclusion of the
> " treaty of peace and the cession of the island to the
> " United States were not without their significance.
> " By that act Porto Rico ceased to be a foreign country,
> " and the right to collect duties upon imports from that
> " island ceased. We think the correlative right to ex-
> " act duties upon importations from New York to Porto
> " Rico also ceased."

Why? Because, as the learned Justice points out,

> " *The spirit as well as the letter of the tariff laws*
> " admit of duties being levied by a military commander
> " *only upon importations from foreign countries;* and
> " while his power is necessarily despotic, this must be
> " understood *rather in an administrative than a legisla-*
> " *tive sense.* While in legislating for a conquered
> " country he may disregard the laws of that country,
> " he is not wholly above the laws of his own."

And at page 236 the Court says further:

> " In our opinion *the authority of the President as*
> " *Commander-in-Chief* to exact duties upon imports from
> " the United States *ceased* with the ratification of the
> " treaty of peace."

This last quotation from the opinion in the Dooley case defines precisely the limitation of the President's authority on this subject as commander-in-chief, and, read in connection with the opinion in this case and the other quotation from the Dooley case, establishes the doctrine that in Manila the President had power as commander-in-chief to collect duties on imports from all foreign countries both during the war and after the ratification; during the war as a military measure incidental to his power to wage war; after the ratification of the treaty as the executive of the tariff laws of the United States, but that he had no power *after the ratification of the treaty* to impose duties on imports from New York into Manila because the United States was no longer foreign, and Congress had not, except in the case of the Foraker Act, which related only to Porto Rico, passed any act imposing duties on goods brought from the United States to the ceded insular territories. As soon as the port of Manila became domestic his power of legislation was strictly limited to providing for such details of administration as the necessities of the case demanded, and he had no power to levy duties on imports from the United States.

(*b*) It follows that the imposition and collection of these duties is not within the terms of the act inasmuch as it ratifies only "the action of the President taken by virtue of the authority vested in him as commander-in-chief as set forth in his order."

The learned Attorney-General asks the Court to construe this act as if the words "by virtue of the authority vested in him as commander-in-chief as set forth in his order," etc., had been omitted. As if, omitting these words, the act read:

> "That the action of the President—heretofore taken
> "—whereby—a tariff of duties and taxes—was collected
> "at all ports and places in the Philippine Islands upon
> "passing into the occupation and possession of the
> "forces of the United States—(is) hereby approved,
> "ratified and confirmed, and the actions of the authori-
> "ties of the government of the Philippine Islands—(in
> "collecting such duties) are hereby approved."

If this is what Congress meant to say why did it not say so in some such short, concise and unequivocal language? Its

meaning would then have been plain and this Court would have been obliged to hold that Congress intended to ratify the illegal and unwarranted seizure and confiscation of the property and money of the claimants and others similarly situated. This construction cannot be given to the act without wholly disregarding the words which we have omitted and treating them as meaningless, in violation of the general principle of statutory construction that, where possible, effect shall be given to every word in the statute. From the language which Congress actually used it is entirely clear that it intended to ratify only such action of the President as he had the constitutional power to perform, as commander-in-chief of the army and navy, and that action only as set forth in the order of July 12th. That order by its proper construction did not apply to imports from the United States after April 11th, 1899. Neither by that order nor by any of its amendments did the President attempt to impose duties on such imports. In fact the collection of the duties was not the act of the President; his act was making the original order and certain of the amendments. The collection of the duties was the act of his subordinates arising out of a misapprehension of the proper construction of the order. The order and amendments did not impose duties on these imports and Congress by ratifying the action of the President as set forth in his order did not ratify acts which the order and amendments did not authorize namely, the collection of the duties involved in these suits.

II. CONGRESS CANNOT HAVE INTENDED TO RATIFY THE COLLECTION OF THE DUTIES INVOLVED IN THESE CASES.

1. *The Court will not impute to Congress the intention to deprive citizens of rights to which this Court had at the time of the passage of the act held that other citizens under like circumstances were entitled.*

The law is now conclusively settled that from April 11th, 1899, until at least November 15th, 1901, the date when the tariff enacted by the Philippine Commission took effect, the claimants and all other merchants had the right to bring their goods duty free into Manila from the United States. This rule of law is based entirely upon and is really deduced as a corollary from the decisions in the first Dooley case and the

case of the Fourteen Diamond Rings decided May 27th, 1901, and December 2d, 1901, respectively.

The alleged act of ratification was passed July 1st, 1902, when these cases were pending; the petition in the Lincoln case having been filed March 29th and in the Warner Barnes case January 18th, 1902. These dates are significant in view of the carefully-guarded language used by Congress. It is clear to us that Congress with full knowledge and appreciation of the decisions of this Court, holding that in Porto Rico the authority vested in the President as commander-in-chief did not include the imposition and collection of duties on goods imported after April 11th, 1899, and before legislation by Congress on the subject, from the United States into Porto Rico, that is from a country no longer foreign, and that the collection of duties during that period in Porto Rico, was not in accordance with the provisions of his order, and that the Philippines, like Porto Rico, were no longer foreign to the United States, and with full knowledge also of the pendency of these actions, involving the extent of the authority vested in the President as commander-in-chief and the question as to whether the collection of these duties was in accordance with the President's order of July 12th, 1898, and its amendments, used the words:

> "action taken by the President *by virtue of the au-*
> "*thority vested in him as commander-in-chief as set*
> "*forth in his order* of July 12th, 1898, whereby a tariff
> "of duties *as set forth by said order.*"

and the words:

> "the action of the authorities of the Government of the
> "Philippine Islands *taken in accordance with the pro-*
> "*visions* of said order and subsequent amendments."

with the intention that full force should be given to their natural meaning and in order to indicate beyond all question that its intention was that only such action of the President as this Court had decided, or might thereafter decide, that he had the power to take and only such actions of the subordinates as were within the terms of the order, were ratified. Had Congress intended to ratify that which this Court had

held, or might thereafter hold, to be illegal and done without authority or warrant of law, it would have said so in unmistakable terms. Not only does the language used plainly express the meaning we have stated, but if the meaning were doubtful every intendment would be against the construction urged in behalf of the Government.

2. *The ratification of the collection of these duties would be entirely inconsistent with the general policy of the legislation by Congress since the decisions in the first insular cases, refunding all the duties, which as this Court decided had been illegally exacted.*

These acts are worthy of more than a brief mention. This Court decided in the first Dooley case, in which claimants were American citizens, that judgment could be recovered against the United States in a suit under the Tucker Act for the recovery of duties illegally exacted in Porto Rico. The great majority of the other claimants who held claims similar to that of Dooley, Smith & Co., thereupon applied to the Secretary of the Treasury for the payment of their claims. The Comptroller of the Treasury to whom the matter was referred decided that there was no available appropriation. The claimants had then no recourse but to sue the military collectors or the Government. The collectors could not be found. There was serious doubt, as to whether native Porto Ricans unless they were American citizens which has not even yet been decided, or aliens, subjects of a power according like privileges to American citizens, which they were before the war, but clearly were not after the treaty, could sue the United States under existing law in the Court of Claims. Congress, therefore, in order to set all questions of jurisdiction at rest and to give the native Porto Rican merchants the same measure of relief to which they would have been entitled had they, like the importers *from* Porto Rico, been in a position to recover judgments against the collectors for the amount of the duties, with interest, on April 29th, 1902, passed a special act (Chap. 640, 31 Stat., 176), "to refund the amount of duties "paid in Porto Rico upon articles imported from the several "States, from April 11th, 1899, to May 1st, 1900, to confer jurisdiction on the Court of Claims to render judgment thereon and making an appropriation therefor." By this act jurisdiction was conferred on the Court of Claims of all claims

against the United States for customs duties paid to the military authorities in Porto Rico upon articles imported from the several States and entered from April 11th, 1899, to May 1st, 1900, and that Court was "empowered *and directed* to ascertain the amounts of such duties paid during said period and to enter judgment against the United States for the several amounts so paid *with interest thereon* at the rate of six per centum per annum from the several dates of payment of such duties to the dates of such judgments, respectively, in all actions for the recovery of such duties now pending in the Court of Claims and in all actions for the recovery of such duties which may be brought in said Court within six months from the date of the passage of this Act." Under section 2, the Secretary of the Treasury was authorized to pay the judgments on certification.

This act amounted to a waiver of all technical defenses which might have existed and in directing the allowance of interest abrogated *pro tanto* the general rule expressed in Section 1091 of the Revised Statutes that the recovery of interest against the United States is not allowed unless expressly stipulated to be paid under the terms of a contract.

Under this Act of April 29th, 1902, judgments for over half a million dollars were recovered in the Court of Claims. Meantime following the decisions in *De Lima vs. Bidwell* and the *Diamond Rings* judgments were entered against the collectors of customs for duties paid on imports from Porto Rico and the Philippines, with interest, amounting to fully two million dollars. In certain cases of this series, however, the government succeeded in defeating the plaintiffs by the plea of no protest(*Dewell vs. Mix*, 116 Fed., 664, *Flint Eddy vs. Bidwell*, 123 Fed., 200 While this defense was technically good and would have been equally good in the Court of Claims (*Chesebrough vs. United States*, 192 U. S., 253), the fact remained that there was money in the Treasury which justly and equitably belonged to the importers. Congress therefore to do equal justice to all similarly situated passed on March 3d, 1903, "An Act to refund the amount of duties paid on merchandise brought into the United States from Porto Rico between April 11, 1899, and May 1, 1900, and *also on merchandise brought into the United States from the Philippine Islands* between April 11th, 1899, and March 8, 1902, and for other purposes" (Chap. 1016, 31

Stat., 1224). This act authorized the Secretary of the Treasury to refund and repay from the appropriation "To repay to importers the excess of deposits for unascertained duties or duties or other moneys paid *under protest*," made by Section 3689, Rev. Stat., moneys paid to the United States *without protest* as duties and as fines on merchandise brought into the United States from Porto Rico *and the Philippines* during the periods stated in the title. This Act was drawn by the Secretary of the Treasury and recommended by him to the favorable consideration of Congress.

The next of this series of enactments is that of March 3d, 1905, Chap. 1447, 33 Stat. 1013, by which Congress extended for a further period of six months from March 3d, 1905, the time within which suits for the recovery of customs duties paid to the military authorities in Porto Rico might be brought under the Act of April 29, 1902, above referred to. The reason for the passage of this last Act was that several Porto Rican merchants through inadvertence or mistake had failed to file their claims within the six months allowed by the Act of 1902. The Court of Claims had however, meantime, in the case of *Basso vs. United States*, 36 Ct. Cl., decided that native Porto Ricans could sue in that Court, so that the principal result of the Act was to allow the Porto Rican merchants to recover interest on their claims for a period of about six years and with respect to certain items of the claims to enlarge the time allowed by the general Statute of Limitations for filing petitions for their recovery.

It is inconceivable that the same Congress which treated the other decisions of this Court in the Insular cases with such respect as not only to refund the moneys which could have been recovered under existing law but to pass special laws for refunding moneys which, while justly and equitably belonging to plaintiffs, the Courts had held that they could not recover by action at law, and to put the native Porto Rican importers on a plane of equal rights with the American importers by allowing the former to recover interest, should single out the merchants who had paid duties in the Philippines, and while actions were pending to test their rights, confiscate these moneys which, as this Court has decided, belong to them.

Such an act of legislation is unheard of, and no act of

Congress will be construed to effectuate such a result on a mere implication, or on account of what the executive authorities may now think Congress must or should have intended.

3. It is always presumed that Congress does not intend to violate any of the provisions of the Constitution, or to repudiate the obligations of the government.

Were the construction of this act doubtful, as it is not, the Court would not adopt a construction, even though in accordance with the natural meaning of the language used, which would effectuate injustice and result in the repudiation of an obligation of the government to pay a just debt.

Knowlton vs. Moore, 178 U. S., 41, 77.

In *Meigs vs. M'Clung's Lessee*, 9 Cr., 11, at 18, Chief-Justice MARSHALL says:

> "The facts that the agents of the United States "took possession of this land, * * * erected ex- "pensive buildings thereon, and placed a garrison there, "cannot be admitted to give an explanation to the "treaty, which would contradict its plain words "and obvious meaning. The land is certainly the "property of the plaintiff below; and *the United States* "*cannot have intended to deprive* him of it by violence "and without compensation."

In *Gibbons vs. United States*, 8 Wall., 269, at 274, this Court says:

> "The supposition that the Government will not pay "its debts or will not do justice is not to be indulged."

In *United States vs. Klein*, 13 Wall., 128, at 144, this Court says:

> "It is as much the duty of the government as of "individuals to fulfil its obligations."

THIRD.

WHAT THE ACT OF JULY 1ST, 1902, WAS INTENDED TO RATIFY IS THE ACTION TAKEN BY THE PRESIDENT IN LEVYING AND COLLECTING DUTIES BY VIRTUE OF HIS AUTHORITY AS COMMANDER-IN-CHIEF, AND THE ACTIONS OF THE AUTHORITIES OF THE GOVERNMENT OF THE PHILIPPINE ISLANDS TAKEN IN ACCORDANCE WITH THE PROVISIONS OF THE ORDER OF JULY 12TH, 1898, AND ITS AMENDMENTS, NAMELY, THE IMPOSITION AND COLLECTION OF DUTIES UPON IMPORTS FROM FOREIGN COUNTRIES INTO THE PHILIPPINES FROM THE TIME THE ORDER TOOK EFFECT NOVEMBER 10TH, 1898, TO NOVEMBER 15TH, 1901, INCLUDING IMPORTS FROM THE UNITED STATES UNTIL APRIL 11TH, 1899.

I. *The legality of the collection of duties upon imports from foreign countries by order of the President prior to legislation by Congress, in either the Philippines or Porto Rico, has never been decided by this Court, and was, therefore, a question of some doubt.*

(a) While the order of July 12th, 1898, and its amendments provided for the collection of duties upon imports from foreign countries, the legality of their collection under a war tariff after the ratification of a treaty of peace, had never been passed upon by this Court.

It is unquestionably the law of this case that this order and its amendments *imposed* duties upon imports from foreign countries. The first Dooley case holds squarely that *prior to the ratification* of the treaty the President had power to impose and collect duties on imports from the United States, because until that time the United States and Porto Rico were foreign the one to the other. That case, however, involved only duties on articles imported from the United States. The opinion did not question, but neither did it affirm, the power of the President after the ratification of the treaty to collect duties upon imports into Porto Rico from foreign countries at the rates prescribed in his military order issued before the ratification of the treaty which rates differed entirely from those prescribed in the tariff laws of the United States. On the other hand, in *Cross vs. Harrison* (16 How., 164), this Court held that as soon as the ratification of the treaty with Mexico

was known to the military governor of California, he had the right and power, acting under the instructions from the President, to put in force the tariff laws of the United States with respect to all importations into California from foreign countries, and that until officially informed of the ratification of the treaty, he was justified in continuing the war tariff in force with respect to foreign importations (16 How., 189).

In this case this Court has said with reference to the construction of the order of July 12th, 1898:

> "The natural view would be that the order expired
> "by its own terms when the war with Spain was at an
> "end. * * * It was a regulation for and during an
> "existing war, referred to as definitely as if it had been
> "named. See Dooley v. United States, 182 U. S., 222,
> "234, 235."

So far as our researches, and those of other counsel who argued the various Insular cases, go, there is no decision of this Court other than *Dooley vs. United States*, No. 1, and *Cross vs. Harrison*, which has any bearing on the legality of the continued collection of duties on imports from foreign countries by the military authorities in a conquered, ceded territory after the ratification of a treaty of cession, under a tariff established by the President during the war as a military measure, and on this point there is an apparent inconsistency between those two cases; the former intimating that such collection is rightful, the other holding (p. 197) that

> "By the ratifications of the treaty, California be-
> "came a part of the United States. And as there is
> "nothing differently stipulated in the treaty with re-
> "spect to commerce, it became instantly bound and
> "privileged by the laws which Congress had passed to
> "raise a revenue from duties on imports and tonnage."

While in *Cross vs. Harrison* the collection of duties in California on foreign imports for a few months after the treaty, under the war tariff, was sustained, this was expressly upon the ground that the ratification of the treaty was not known to the military governor at the time. As soon as he did know of it he put the tariff laws of the United States in force (see 16 How., 191, 192; *Dooley vs. United States*, 182 U. S., 232).

There is therefore no authority directly in point as to the

legality of the collection of duties in the Philippines on foreign imports after the ratification of the treaty, under the provisions of the order of July 12th, 1898, and its amendments.

(*b*) The order of July 12, 1898, imposed duties on certain articles which under the tariff laws of the United States were on the free list and with respect to which there might well be some doubt as to the power of the President.

By referring to Senate Document 134, 57th Congress, first session "certain memoranda relating to the tariff between the United States and the Philippine Islands" Exhibit C "Comparison of new tariff with the proposed tariff, the old tariff and the United States tariff" we find on pages 34 and 43 a number of articles free under the Dingley Tariff and subject to duty under the order of July 12, 1898, and its amendments.

While as a whole the duties prescribed by this war tariff were much lower than those prescribed by the Tariff Laws of the United States (Senate Doc. 134, *supra*, p. 10), an examination of this comparative table would doubtless show a few individual instances where they were higher, but enough has been said to prove our point that upon certain articles imported from foreign countries the President, after the ratification of the treaty, collected duties without the authority of any act of Congress.

As to the legality of such collections there is certainly doubt, but the action of the military authorities in collecting such duties was doubtless "taken in accordance with the provisions of the order and amendments" and therefore within the terms of the ratification.

(*c*) The amount of duties collected in the Philippines on imports from foreign countries was enormous, and many times greater than the amount collected on imports from the United States.

Exhibit "E," page 89 of Senate Document 134, *supra*, shows that for the fiscal year 1900 the *total value of all goods* imported from the United States was but $1,657,701; in 1901, $2,855,685, while from all other countries the values were $20,601,436 and $30,279,406. The amounts of duties collected were doubtless in about the same proportion.

II. *Congress in ratifying the action taken by the President as to the legality of which there might be doubt, but which was*

probably within the scope of his constitutional power followed its own precedents of a hundred years, but did not embark on a new course of legislation by attempting to ratify action beyond the scope of the President's power as judicially defined.

We need only refer to *Hamilton vs. Dillin*, 21 Wall., 73; *Prize Cases*, 2 Black, 635; *Cross vs. Harrison*, 16 How., 164, for instances of Congress having, out of abundant caution, ratified actions of the President held by this Court to have been within his power.

This very Act of July 1st, 1902, contains, in Section 1, a ratification and approval of "the action of the President in creating the Philippine Commission and authorizing it to exercise the powers of government to the extent and in the manner, etc., set forth in his instructions of April 7, 1900, and in creating the offices of governor and vice-governor, and authorizing them to exercise the powers of government to the extent, etc., set fort. in the executive order dated June 21, 1901, and in establishing four executive departments of government in said Islands as set forth in the Act of the Philippine Commission—enacted September 6, 1901."

With reference to the powers of the Philippine Commission to make laws for the government of the islands this Court, without referring to this ratification, says, in *Dorr vs. United States*, 195 U. S., 138, 153:

> "The act was one of the laws of the Philippine
> "Commission, passed by that body by virtue of the
> "authority given the President under the so-called
> "Spooner resolution of March 2, 1901. The right of
> "Congress to authorize a temporary government of this
> "character is not open to question at this day. The
> "power has been frequently exercised and is too well
> "settled to require further discussion. *De Lima v.*
> "*Bidwell*, 182 U. S., 1, 196."

While the collection of duties upon imports from foreign countries into the Philippines after the ratification of the treaty at different rates from those prescribed by the Tariff Laws of the United States was, as we have said, probably within the authority vested in the President as commander-in-chief, yet this question was by no means free from doubt. It might have been said, in spite of the intimations in the first Dooley case, that under the decision in *Cross vs. Harrison* it

was the "plain duty" of the President in faithfully executing the Laws of the United States to collect duties in the Philippines immediately upon the ratification of the treaty at the rates prescribed in the Tariff Laws of the United States. His failure to do so might well have been the ground of congressional inquiry at some time in the future had there been a change in the results of the elections. Far, therefore, from being an idle thing for Congress to do, to ratify actions within the scope of the President's authority, it was under the circumstances, most natural for the new Congress elected while the President was governing the Philippines without special legislation by Congress to place upon record its approval of and confidence in the actions of the President taken by virtue of the authority vested in him as commander-in-chief by the Constitution.

FOURTH. THE COURT SHOULD ADHERE TO THE OPINION IN THESE CASES ALREADY ANNOUNCED AND MADE A PART OF ITS JUDICIAL RECORDS.

January, 1906.

HENRY M. WARD,
For Plaintiffs in Error and Appellant,
32 Nassau Street,
New York City.

JOHN G. CARLISLE,
Counsel.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
FEB 5 1906
JAMES H. McKENNEY,
Clerk.

FREDERICK W. LINCOLN AND OTHERS,
Plaintiffs in Error,
against
THE UNITED STATES,
Defendant in Error.

No. 149.

WARNER, BARNES & CO., LIMITED,
Appellant,
against
THE UNITED STATES,
Appellee.

No. 466.

Further Memorandum for Plaintiffs in Error and Appellant with Reference to the Text of the Order of October 26, 1898.

JOHN G. CARLISLE,
PAUL FULLER,
FREDERIC R. COUDERT,
HENRY M. WARD,
For Plaintiffs in Error and Appellant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN and others, Plaintiffs in Error, AGAINST THE UNITED STATES, Defendant in Error.	No. 149.
WARNER, BARNES & CO., LIMITED, Appellant, AGAINST THE UNITED STATES, Appellee.	No. 466.

Further memorandum for plaintiffs in error and appellant with reference to the text of the order of October 26, 1898.

The Attorney-General having filed the order of the Military Governor of the Philippines of October 26, 1898, which embodies the full text of the customs tariff and regulations annexed to the President's order of July 12, 1898, and one of the Justices having intimated upon the re-argument that the full text of the tariff and regulations was not before the Court when the opinion in this case was written, we think it proper to bring two points to the attention of the Court.

First. This order of October 26, 1898, was made nearly six months before the ratification of the treaty of peace, and consequently at a time when the United States and the Philippines were mutually foreign to each other. It is in all essential respects a repetition of the order of July 12. Consequently, the provisions in this order to which attention was called upon the reargument that the manifests of vessels from ports in the United States should be certified by the Collector of the port of sailing (par. 2, p. 1). That the duty, etc., should be collected in uniform manner regardless of the country of the origin of the merchandise (par. 315, p. 29) and the further provisions mentioned in the Government's briefs herein that merchandise imported for the use of the Government should be exempt from wharf charges (p. 18), that all supplies for the use of the Army and Navy should be admitted without payment of duty (p. 22), and the general provision in the last paragraph that the foregoing schedules should remain in force until duly modified, suspended or revoked (Par. 372, page 40), *all related at the time they were made to imports from foreign countries and from foreign countries only*, for at that time under the decisions in the *First Dooley case* and the *Diamond Rings case*, the United States was foreign to the Philippines and remained so until the ratification of the Treaty on April 11th, 1899, and no suggestion has been made but that Spain was also foreign to the Philippines during the same period. Therefore, importations from a country not foreign, *i. e.*, domestic to the Philippines, *were not within the scope of the language of any of these sections.* They all, when made, were intended to apply to foreign countries only and this meaning was never changed by any express order or amendment making them specifically applicable to importations from the United States when the United States had become domestic, *i. e.*, after April 11th, 1899.

Second. The Porto Rican order of January 10th, 1899, which was construed by this Court in the first Dooley case, contained provisions similar to those in the Philippine order just referred to and expressly provided in so many words that

"*importations from the United States are dutiable like other commodities.*"

The Porto Rican order was promulgated January 20, 1899, to take effect February 1st, 1899, *i. e.*, after the Treaty had been signed and when it had been sent to the United States Senate for ratification, an important point to bear in mind in construing the Porto Rican order, for plainly the duties authorized by that order were not as they were in the Philippine order, levied as a military contribution, but were taxes levied by the *de facto* Civil Government for its support; and, at the time that the Porto Rican order was made, Porto Rico had been evacuated by the Spaniards; the United States was in full possession; the treaty had been signed and was on the point of being ratified. Therefore, the Porto Rican order *was apparently intended to apply to imports from the United States, not only during the short period of weeks which might intervene before the exchange of ratifications, but after the exchange* and until Congress should legislate on the subject.

The Porto Rican order contained in Section 2 a provision that navigation between the United States and Porto Rico should be confined to American vessels. Section 4 contained a provision substantially identical with that in the Philippine order, that the manifest of vessels from ports in the United States should be certified by the Collector of the port of sailing. By Section 27 it was provided that all supplies and materials for the use of the Army and Navy should be admitted without payment of duty, and finally, immediately preceding the schedules of the import rates of duties, is the provision that "importations from the United States are "dutiable like other commodities."

There is no section of the Porto Rican order providing that importations shall be subject to uniform duties regardless of the country of origin; but it is clear that the provision to that effect in the Philippine order, made six months before the ratification of the treaty, was when made intended to apply to imports from foreign countries only; but the provision in the Porto Rican order, *that importations from the United States should be dutiable like other commodities* plainly speaks for itself; yet this Court by the decision in the First Dooley case has held (without directly passing upon the point) that this particular provision of the

Porto Rican order remained in force only from February 1st to April 11th, 1899, and that thereafter the entire order ceased to apply to importations from the United States.

In conclusion we submit that an examination of the text of the Philippine order and a comparison of the provisions of that order with the similar provisions of the Porto Rican order, serve to strengthen the position which we have maintained throughout this case, that the Philippine order was intended to apply to importations into the Philippines from foreign countries only and, therefore, did not apply to imports from the United States after April 11th, 1899.

February 1st, 1906.

JOHN G. CARLISLE,
PAUL FULLER,
FREDERIC R. COUDERT,
HENRY M. WARD,
For Plaintiffs in Error and Appellant.

Supreme Court of the United States.

Nos. 149 and 466.—October Term, 1904.

Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody & Co., Plaintiffs in Error, *vs.* The United States.	In error to the District Court of the United States for the Southern District of New York.
149	
Warner, Barnes and Company, Limited, Appellant, *vs.* The United States.	Appeal from the Court of Claims.
466	

[May 28, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

These are suits to recover duties exacted from plaintiffs in error and appellants upon merchandise shipped by them from New York to Manila, and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain were exchanged and the treaty proclaimed, and October 25, 1901. The duties were levied under an order of the President, dated July 12, 1898. The cases were argued in this court March 3, 1905, and the judgments reversed April 3, 1905. 197 U. S. 429.

We ruled that the order of July 12, 1898, was a regulation for and during the then existing war with Spain, referred to as definitely as if it had been named, and that the right to levy duties thereunder on goods brought from the United States ceased on the exchange of ratifications. *Dooley* v. *United States*, 182 U. S. 222.

And that after title passed, April 11, 1899, there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act. *Fourteen Diamond Rings*, 183 U. S. 176. As to the subsidiary point that whether the exaction of the duties was lawful or not, it had been ratified by the act of July 1, 1902, 32 Stat. 691, 692, c. 1369, § 2, we were of opinion that the ratification of "the actions of the authorities taken in accordance with the provisions of said order and subsequent amendments" was confined to actions which were taken in accordance with the provisions of the

order and amendments, which these exactions were not. May 29, 1905, we allowed petitions for rehearing to be filed addressed solely to the matter of ratification, and subsequently (November 13) a rehearing was granted "as to the question whether Congress ratified the collection of the sums sought to be recovered in these suits."

The cases were reargued January 18 and 19 on that question.

That the moneys exacted from plaintiffs in error and appellants were illegally exacted is not open to question under our order, unless the act of July 1, 1902, operated to the contrary. The second section of that act reads as follows: "That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander-in-Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved."

The order of July 12, 1898, by President McKinley, as Commander-in-Chief, directed that upon occupation of any ports or places in the Philippine Islands by the forces of the United States an accompanying tariff of duties and taxes should be levied and collected as a military contribution, and that regulations for its administration should take effect and be in force in the ports and places occupied. Manila was captured August 13, and the next day the custom house was opened and taxes were collected according to the prior Spanish tariff up to November 10, 1898, until which date the order of July 12 had been suspended.

On the rehearing an order of the Military Governor of the Philippines of October 26, 1898, which embodied the full text of the customs tariff and regulations, was brought forward, and was in all essential respects a repetition of the order of July 12.

The Porto Rican cases were decided May 27, 1901, and in June the Secretary of War cabled the commission at Manila that: "The most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the court, is in the fact that Porto Rico was at the time of cession in full peaceable possession, while a state of war has continued in the Philippines. As the question of the President's power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court, the President has determined to continue to impose duties as heretofore."

Undoubtedly the order of July 12, 1898, contemplated vessels from America as well as others, yet that order, having been made in time of war, for a military contribution, when the Philippines did not belong to us, must be taken to have contemplated them, as it contemplated those from other countries, as vessels foreign to the country, and to have imposed the tax upon them *qua* foreign. The military tax was, so to speak, a seizure of Spanish revenues. That was what the order meant when it was passed, and a change of circumstances did not change its meaning. Neither was the meaning changed by any amendment. The ground on which it was kept in force by the Secretary of War, June 8, 1901, was that the Philippines were still in a state of war. If that view had been correct the order would have applied and would have had lawful effect, but it turned out not to be correct.

The ratification may be assumed to apply to the order as actually made, and not to have been limited to such an order or so much of this order as the President had a right to make. But it does not construe the order, and as it confines the ratification to actions in accordance with the order and amendments, the question what actions were in accordance with them is for us. The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order. If the order properly construed did not purport to apply to vessels unless they were either enemy or foreign, then when a vessel ceased to be foreign the order did not apply, and a tax upon such a vessel not being in accordance with the order is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted, *Hamilton* v. *Dillin*, 21 Wall. 73, still it is not to be presumed to do so on language which, literally taken, has a narrower sense.

Morever, the act of July, 1902, was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubt, at least, had been thrown upon its power to ratify a tax under circumstances like the present. *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200. This affords a special reason for believing that if it had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape.

It should also be remembered that there was a powerful opposition in Congress and that the phraseology of the act probably represents all that it was deemed safe to ask. Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words. In a literal sense they ratify only actions in accordance with the order construed as it would have been construed by this court had it come before us upon the day when it was made.

It is not a sufficient answer to say that the ratification was meaningless unless it embraced duties collected on imports from the United States after April 11, 1899, because the exactions before were legal. The instances are many where Congress out of abundant caution has ratified what did not need, or was afterwards found not to have needed, ratification. *Cross* v. *Harrison*, 16 How. 164; *Prize Cases*, 2 Black, 635.

It would be inadmissible to lay down as a general rule that a particular ratification covered what was not, in the judgment of the courts, included or intended to be, simply because it might be thought to have been otherwise unnecessary.

In these cases, however, the ratification act was not otherwise meaningless. Duties were collected under the order of July 12, 1898, as a military contribution while the war with Spain was in progress. The treaty was signed December 10, 1898, and the President on December 21 issued an order proclaiming the sovereignty of the United States in the islands and directing duties and taxes to be collected in future as public revenues for the support of the government. When the treaty was ratified the applicable laws of the United States became operative, but the President, nevertheless, continued in force the tariff created by the order of July 12, 1898, and by an order of April 21, 1899, established a collection district with Manila as the chief port of entry, and under these orders collections of duties were made. This involves the question whether after April 11, 1899, the President could have enforced any tariff other than such as existed under acts of Congress or might be sanctioned by Congress. And that question was put at rest by this ratification.

Much more might be said, but we think it would needlessly prolong this opinion.

Notwithstanding the able argument of the Attorney General, we adhere to the conclusion previously announced.

Judgments reversed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

Nos. 149 and 466.—October Term, 1904.

Frederic W. Lincoln, Henry W. Peabody, John R. Bradlee, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody & Co., Plaintiffs in Error, *vs.* The United States.	In error to the District Court of the United States for the Southern District of New York.
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Warner, Barnes and Company, Limited, Appellant, *vs.* The United States.	Appeal from the Court of Claims.
466	

[May 28, 1906.]

Mr. Justice White, with whom concurs Mr. Justice McKenna, dissenting:

Although I dissented in *De Lima* v. *Bidwell*, (182 U. S. 1,) *Dooley* v. *United States*, (182 U. S. 222,) and *Fourteen Diamond Rings*, (183 U. S. 176,) nevertheless I agreed to the judgment of reversal as previously rendered in this case. (197 U. S. 429.) I was constrained so to do because to me it seemed that the determination of the substantial issues in the case were foreclosed by the prior cases above mentioned, which were binding on me under the rule of *stare decisis*. It is true that in this case, as previously argued and decided, there was present the question of an alleged ratification by Congress of the imposition and collection of the taxes in controversy; but, on the former argument, my attention was not directed to public reports and documents throwing light upon the scope of the ratifying act, as was done on the present argument. Construing the act of Congress which is relied upon to establish the ratification, by the light of the public documents referred to, my mind sees no possible escape from the conclusion that that act was intended to and did ratify the collection of the charges complained of. Having no doubt of the power of Congress to ratify, to my mind it clearly results that I erred in giving my assent to the previous judgment of reversal, and I therefore dissent from the opinion and conclusion of the court now announced.

I am authorized to say that Mr. Justice McKenna concurs in this dissent.